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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-9241

SAVE OUR VALUABLE LAND (SOIL), INC., et al.,
Petitioners,

vs.

COLONEL WILLIAM R. NEEDHAM, et al.,
Respondents,

and

CITY OF OLATHE, KANSAS, et al.,
Intervenor-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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OPINIONS BELOW

The opinion of the United States District Court for the District of Kansas is unreported. The opinion of the United States Court of Appeals for the Tenth Circuit, dated September 29, 1976, is not yet reported. Both opinions are printed in the Appendix, infra, pages A1-A46 and A48-A56 respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on September 29, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the proper scope of judicial review of a final decision by a federal agency to recommend or propose legislation and/or other major federal action significantly affecting the quality of the human environment is limited to a review of the procedural requirements of 42 U.S.C. Section 4332(c) or in addition the reviewing court must scrutinize the decision itself in light of the final environmental impact statement (EIS) so as to insure compliance with the substantive requirements of the National Environmental Policy Act of 1969 (42 U.S.C. Section 4331 et seq.) in order to determine if the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law (5 U.S.C. Section 706(2)(A)?

2. Whether the discussion of the alternatives in the EIS is in compliance with 42 U.S.C. Section 4332(1), (2), (A), (B), (C) and (E) (which was formerly designated D)?

3. Whether a discussion and analysis of the benefit-cost ratio is required by 42 U.S.C. Section 4332(1), (2), (A), (B), (C)?

4. Whether an EIS must either be redrafted or amended after intervening circumstances have occurred prior to initiation of construction so as to make the statement obsolete in total or in part?

5. Whether 33 U.S.C. Section 1252(b)(3) is applicable to the Hillsdale Reservoir Project, and if not must the Corps of Engineers mention such in the EIS?

6. Whether 43 U.S.C. Section 390b (b) was not complied with in the manner intended by Congress?

7. Whether the Corps of Engineers failed to comply with 16 U.S.C. Sections 662 and 663 in failing to consult with the required agencies, in not formulating a sufficient mitigation plan, in not submitting said plan to Congress and if the Corps of Engineers failed to do all three should it not have mentioned such in the final EIS?

STATUTES INVOLVED

This case involves the Fish and Wildlife Coordination Act, 16 U.S.C. Sections 661-663; the 1972 Amendments to the Federal Water Pollution Control Act, PL 92-500 and PL 93-251, 33 U.S.C. Sections 1251-1252a; the National Environmental Policy Act of 1969, 42 U.S.C. Sections 4321-4332; and the Water Supply Act of 1958, as amended, 43 U.S.C. Section 390b. Pertinent sections of these statutes are printed in the Appendix, infra, pages A56-A76.

STATEMENT OF THE CASE

This civil action arises out of a water resource project known as the Hillsdale Lake which the Corps of Engineers is constructing on Big Bull Creek near the town of Hillsdale in Miami County, Kansas. Big Bull Creek is a tributary of the Marais des Cygnes River which flows into Missouri where it is named the Osage River. The Hillsdale Lake project was authorized by the Flood Control Act of 1954, Public Law 83-780, as a part of a nine reservoir system, the basic purpose of which was to alleviate problems of flooding of towns and agricultural lands (Finding of Fact No. 12). The jurisdiction in the District Court was asserted under 28 U.S.C. 133(a), 28 U.S.C. 1361 and 5 U.S.C. 701-706.

The petitioners are twelve individuals and Save Our Invaluable Land, Inc. (SOIL), a non-profit membership corporation organized under the laws of the State of Kansas. Ten of the twelve individual petitioners own land that is required for the Hillsdale project. These petitioners derive all or part of their livelihood from their land and wish to have their land preserved in its present state and to have continued use and enjoyment thereof. Two of the petitioners own land adjacent to the project and assert that their land will be stressed by growth and pressure generated by the project. They desire their land to be maintained in its present state so that they might continue to enjoy the benefits of the area. The membership of SOIL consists of about 60 individuals who own land acquired for the Hillsdale Lake project or land in close proximity thereto (Findings of Fact Nos. 1-3). This lawsuit was brought by petitioners as a class action (Finding of Fact No. 4) and was certified as a class action (Conclusion of Law No. 5).

The respondents are all officials of the United States of America. Three of the respondents exercise administrative supervision of the Corps of Engineers including its responsibility for the construction of the Hillsdale Lake (Findings of Fact Nos. 5-7). Two of the respondents have administrative supervision over the responsibilities assigned to the Environmental Protection Agency (Findings of Fact Nos. 8 and 9), including its responsibility under Public Law 92-500.

A number of local municipalities, rural water districts and development or civic organizations intervened as defendants-intervenor asserting economic or environmental interests in the continuation of the Hillsdale project (Finding of Fact No. 10).

Although the project was authorized by Congress in 1954 it remained inactive for seven years. In 1961, and again in 1966, the project was deferred for restudy (Finding of Fact No. 13). The restudy was completed and the project entered the advanced engineering and design phase with Congress appropriating funds for such planning for fiscal years 1968 through 1972 (Finding of Fact No. 14). The National Environmental Policy Act of 1969 was passed and became effective on January 1, 1970. A draft environmental impact statement was prepared by the Corps of Engineers and circulated to agencies and interested parties for comment on September 17, 1971. The final impact statement (Court Ex. 1) was filed with the Council on Environmental Quality on February 2, 1972 (Slip Op. at 9), the final EIS having been completed by the Corps of Engineers in late November, 1971.

The EIS having been filed with CEQ, representatives of the Corps of Engineers appeared at the annual budget hearings of Congress in the spring of 1972 requesting funds for the construction of the Hillsdale project. On August 25, 1972 funds were appropriated by Congress to initiate construction, including land acquisition, of the project (Finding of Fact No. 17). On October 18, 1972, Congress enacted the 1972 Amendments to the Federal Water Pollution Control Act, Public Law 92-500, 33 U.S.C. 1251 et seq. (Finding of Fact No. 19). Initiation of construction was delayed, however, because the funds previously appropriated by Congress were impounded, placed in budgetary reserve, until October 1, 1973 (Finding of Fact No. 17). Initiation of the project was not possible also because a contract had not been signed between the United States and some local interests for reimbursement for the cost of storage for water supply uses by local units of government pursuant to the requirements of the Water Supply Act of 1958,

as amended (Tr. at 363-364). The water supply contract was not signed and approved until April 6, 1974 (P.Ex. 56), and negotiations for the purchase of land for the Hillsdale project began soon thereafter (P.Ex. 17). Construction of the project was initiated on June 21, 1974 by the acquisition of the first tract of land for the project (P.Ex. 17). After the initiation of land acquisition by negotiation in late June, 1974 (Finding of Fact No. 43) the first land acquired for the project by condemnation was taken on December 2, 1974 (Finding of Fact No. 44) and the first contract relating to construction of the project was awarded on December 2, 1974 enabling construction of an administrative facility, installation of utilities, preparation of access roads (Finding of Fact No. 35). Upon information and belief bids for the Stage I construction of the Hillsdale project were opened on March 24, 1976 with an apparent low bid of $2,625,820. This Stage I construction contract was awarded in late April, 1976.

The Corps of Engineers, to justify inclusion of storage for local water supply uses under the Water Supply Act of 1958, relies upon a contract signed with the Kansas Water Resources Board, P.Ex. 56, and has not conducted a study to determine the actual needs for water supply in the Hillsdale area (Stip. No. 28, Tr. at 363-366, 402). Until the contract with the Kansas Water Resources Board was signed and approved, April 6, 1974, land acquisition and construction of the project could not legally be initiated.

During the delay between the issuance of the impact statement and the initiation of construction significant archaeological resources were discovered in the Hillsdale area. Although as many as 48 archaeological sites were known in the Hillsdale area to archaeologists who had been doing survey work through the summer of 1971 (Tr. at 52) only four of those sites have been excavated and

five additional sites had been tested. Subsequent archaeological investigation revealed archaeological resources broadly reflective of three major classifications: (1) early and late archaic; (2) plains woodland; and, (3) central plains phase. In addition, there are indications, including a distinctive projectile point found in the area, that representatives of the Nebo Hill culture may be located in the area. This culture is named for the location in Missouri where it was first indicated and it represents one of the earliest known cultures thus far identified in the east central Great Plains (Finding of Fact No. 54). Archaeological sites in the area which have been only located and recorded may be representative of cultures not yet identified in the area. If testing of the unexcavated sites is not conducted information concerning such unidentified cultures will be lost by project activities to the extent that such information exists in the area (Finding of Fact No. 55).

Although the Corps of Engineers is required by the Fish and Wildlife Coordination Act of 1958 to make adequate provision for the conservation and management of wildlife no detailed plan to mitigate the losses to wildlife to be caused by the project has been formulated (Tr. 151, 171, 174, 178, 179, 182, and 213) nor has it been submitted to Congress for consideration as to funding. Upon information and belief the United States Department of the Interior, Fish and Wildlife Service, made a detailed proposal to the Corps of Engineers for a fish and wildlife mitigation plan at the Hillsdale project. The proposal was submitted to the Corps of Engineers by a letter of January 12, 1976. The document transmitted from the Fish and Wildlife Service is a proposed mitigation plan which has not been adopted or implemented by the Corps of Engineers nor has it been included in any report or recommendation to Congress by the Corps of Engineers.

Construction at the dam site began in May, 1976. Although significant alterations of the landscape in the immediate vicinity have been made, such modifications could be restored or altered if this project were abandoned or modified as a result of this litigation. It is thus not too late to cure the administrative and procedural ills complained of herein. Petitioners assert that further work on the project should be delayed until the Environmental Protection Agency has studied the need for storage for water quality control, until the Corps of Engineers has utilized a systematic and interdisciplinary approach to decision-making ensuring that environmental amenities are given appropriate consideration, until an impact statement with the requisite reasonable discussion of topics is prepared and filed and until the Corps of Engineers studies the need for local water supply or enters a binding contract with local interests for the repayment of all costs associated with storage for water supply.

REASONS FOR GRANTING THE WRIT

Since the enactment of the National Environmental Policy Act of 1969 (42 U.S.C. 4331 et seq.) (hereinafter referred to as NEPA) this Court has failed to delineate the proper scope of judicial review of an environmental impact statement (EIS) as well as the determinative criteria of an adequate EIS. Such a decision at first may have been justified by the Court's desire to allow the various aspects of this important legislation to be developed and analyzed by the federal courts to allow this Court to make a full and completely informed decision. This time has now passed. Since the passage of this Act substantial litigation has occurred in the federal courts with a commensurate amount of activity by authors of legal articles and treatises. The result of this litigation has been various conflicting interpretations of the requirements and mandates of NEPA. There is no uniformity. This confusion is unacceptable in light of the importance that Congress, via the NEPA legislation, has placed on the allocation of scarce resources in our finite world. The allocation of scarce resources should no longer be made by the federal government without full and complete compliance with the congressional mandate that a decision be made only after its ramifications and possible alternatives are understood and evaluated. Some of the interpretations of NEPA by the federal courts have emasculated this goal. This case should be heard to decide if the interpretation given NEPA by the Tenth Circuit does in fact circumvent the mandate of the Congress.

1. This court should resolve the differences among the Circuit Courts of Appeal as to the proper scope of judicial review and require a substantive review of an EIS in order to effect the congressional intent in NEPA.

The district court in this case concluded as a matter of law that the judicial review of an EIS is limited to the determination of whether the statement is an objective, good faith effort to comply with NEPA and a reasonable presentation of the subject area mandated by NEPA. The Tenth Circuit affirmed stating that judicial review of an EIS is limited to a consideration of the following: (1) does the EIS discuss all of the five procedural requirements stated in 42 U.S.C. Section 4332(c) (i-v), (2) does the EIS constitute a good faith compliance with the demands of NEPA, and (3) does the statement contain a reasonable discussion of the subject matter involved in the five respective areas? The court in effect reaffirmed its previous holding of *National Helium Corp.* v. *Morton*, 486 F.2d 995 (10th Cir. 1973), cert. denied, 416 U.S. 993 (1973) in which it expressly rejected any substantive review of an EIS.

The rationale of the Tenth Circuit has been that substantive review pursuant to 5 U.S.C. Section 706(2) (A)—(i.e., "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law")—is not required since preparation of an EIS is merely a prerequisite before "agency action" and is not agency action within the meaning of 5 U.S.C. Section 706(2) (A). In short, there is no "law to apply." Such a conclusion is in contravention of the definition of the term "agency action" pursuant to 5 U.S.C. Section 551(13) and more particularly the definition of the term "rule" pursuant to 5 U.S.C. Section 551(4). It is in effect a rejection of this court's holding in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 413 (1971). The Tenth Circuit conclusion rejects the great weight of authority, to wit, *Silva* v. *Lynn*, 482 F.2d 1282, 1283 (1st Cir. 1973); *Conservation Council* v. *Froehlke*, 473 F.2d 664, 665 (4th Cir. 1973); *Environmental Defense Fund Inc.* v. *Corps of Eng'rs*, 492 F.2d 1123, 1138 (5th Cir. 1974); *Environmental Defense Fund Inc.* v. *Tenn. Valley Authority*, 371 F.Supp. 1004, 1013, aff'd 492 F.2d 497 (6th Cir. 1974); *Sierra Club* v. *Froehlke*, 486 F.2d 946, 951 (7th Cir. 1973); *Environmental Defense Fund Inc.* v. *Froehlke*, 473 F.2d 346, 352 (8th Cir. 1972); *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972). The only other circuit joining the Tenth is the Ninth Circuit—*Jicarillo Apache Tribe of Indians* v. *Morton*, 471 F.2d 1273 (9th Cir. 1973). The Second Circuit has not spoken to this issue.

The rationale of substantive review is best stated in *Environmental Defense Fund* v. *Corps of Eng'rs*, 470 F.2d 289, 297 (8th Cir. 1972):

> The Act is more than an environmental full disclosure law. It was intended to effect substantive changes in decision making; 101(b) (of NEPA) sets out specific environmental goals to serve as a set of policies to guide agency action affecting the environment . . . Where NEPA is involved, the reviewing court must first determine if the agency reached its decision after a full good faith consideration and balancing of environmental factors. Then the court must then determine according to the standards set forth in 101(b) and 102(1) of the Act, whether the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values.

Although the present weight of authority is in favor of substantive review, the petitioners would not seek review in this court except for the harsh result of the Tenth Circuit Rule. The final EIS in this case contained only sixty (60) pages, but even this is deceiving since only the first eleven (11) pages reflect the required detailed statement pursuant to 42 U.S.C. 2(c) (i-v). Included within this eleven (11) pages are: (1), a 2 page index; (2), a 1 page project description including the following simplistic analysis and presentation of the benefit-cost ratio: "The benefit-cost ratio for the project is 1.8 at 1971 price levels;" (3), a 1-1/4 page description of the area as it was before the project was started; (4), a 3-1/2 page discussion of the environmental impacts of which 3/4 of a page is mere repetition; (5), a 1 page discussion of the efforts to lessen adverse impacts; (6), a 1/2 page discussion of the adverse environmental effects; (7), a 3/4 page discussion of the five recognized alternatives to the project; (8), a 1/4 page discussion of the relationship between short-term uses of man's environment and enhancement of productivity; and (9), a 1/4 page discussion of the irreversible commitments of resources which would occur if the proposed action should be implemented. The balance of the final EIS includes 11-1/2 pages of the comments of the federal and

state agencies with the response of the Corps of Engineers and a 5-1/2 page discussion of 2 published articles by Dr. E. Raymond Hall. The former composed of either minor corrections made to the final EIS or self-serving statements by the Corps adding little, if anything, to the final EIS. The latter is a defense of the proposed project and is repetitive of the first eleven (11) pages of the EIS and an attempt to discredit conclusions of Dr. Hall rather than any helpful discussion which will provide meaningful input to decision-making. The final 32 pages are the actual documents submitted by the commenting agencies and the two aforesaid articles of Dr. E. Raymond Hall.

Although a brief EIS, such as this one, might comply with the requirements of NEPA, the EIS here lacks depth and analysis and detail sufficient to the rigors of the Act. The low standard of review set forth by the Tenth Circuit has allowed such to occur. This Court should review this case to determine if the mandate of the Congress has been erroneously construed.

2. The Courts below erred in failing to require a vigorous analysis of all reasonable alternatives to the proposed project.

In less than one page of the EIS the Corps of Engineers attempted to satisfy the NEPA mandate that to the "fullest extent possible" a detailed statement of alternatives to the project be discussed (43 U.S.C. Section 4332). The EIS nominally sets out the alternatives of no action, of alternative sites, of a single purpose reservoir only, of flood plain zoning, and of construction of levees and dredging the channel. There is no discussion of the alternative water sources available or even a statement why there is none available. The discussion of each given alternative is shallow being nothing more than what an

uninformed layman would know. This is blatant error where even an informed layman would perceive more analysis and discussion is needed if a knowledgeable decision is to be made.

To allow such to pass NEPA standard violates the Congressional mandate of NEPA and will be the effect of denying this writ. The fact this EIS was sustained is the direct result of no substantive review and even a lack of adequate procedural review. It rejects and is in plain contradiction with *Environmental Defense Fund Inc.* v. *Corps of Eng'rs of U. S. Army*, 492 F.2d 1123, 1135 (5th Cir. 1974), *Environmental Defense Fund Inc.* v. *Corps of Eng'rs, U. S. Army*, 470 F.2d 289, 296 (8th Cir. 1972) and *Natural Resources Defense Council, Inc.* v. *Morton*, 458 F.2d 827, 834 and 836 (D.C. Cir. 1972). It further rejects Council on Environmental Quality guidelines applicable at the time of the project, rules promulgated to enforce the intent of Section 102(2)(D) of NEPA [36 Fed. Reg. 7724, 7725 (1971)].

As stated in *Natural Resources Defense Council Inc.*, supra, at 834:

> "A second construction of NEPA, which takes into account both the legislative history and contemporaneous executive construction requires presentation of environmental risks incident to reasonable alternative courses of action. The agency may limit its discussion of the environmental impact to a brief statement, when that is the case, that the alternative course involves no effect on the environment . . . What is required is information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned . . ."

The EIS fails to meet the Congressional mandate of NEPA.

3. The Courts below should have examined the EIS to determine whether the one sentence description in the EIS of the benefit-cost analysis of the project met the requirements of NEPA.

The total discussion in the EIS of the benefit-cost ratio is "The benefit-cost ratio for the project is 1.8 at 1971 price levels." This is the entire effort to comply with Section 102 (1) (2) (A), (B) and (C) of NEPA (42 U.S.C. Section 4332 (1) (2) (A), (B) and (C)).

Without an analysis of the pertinent data and assumptions which go into the computation of the benefit-cost ratio meaningful understanding of the costs and benefits of the project is impossible. This result was sustained by the district court opinion that there was an adequate discussion of benefit-cost ratio and is directly accountable to the lack of substantive review and a failure of even meaningful procedural review. The Tenth Circuit has in effect reaffirmed its previous holding in *Sierra Club* v. *Stamm*, 507 F.2d 788, 794 (10th Cir. 1974). Only one other circuit joins the Tenth: *Environmental Defense Fund Inc.* v. *Armstrong*, 352 F.Supp. 50, 57 (N.D.Cal. 1972), aff'd 487 F.2d 814 (9th Cir. 1973).

The decision of the Tenth Circuit is in conflict with *Environmental Defense Fund Inc.* v. *Froehlke*, 473 F.2d 346, 351 (8th Cir. 1973); *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Comm'n*, 449 F.2d 1109, 1113-14 (D.C. Cir. 1971), cert. denied 404 U.S. 942 (1972); *Sierra Club* v. *Callaway*, 499 F.2d 982, 992-993 (5th Cir. 1974) (which refers to and accepts the findings in *Montgomery* v. *Ellis*, 364 F.Supp. 517, 521 (N.D.Ala. 1973)); *Cape Henry Bird Club* v. *Laird*, 359 F.Supp. 404 (W.D.Vir. 1973), aff'd 484 F.2d 457 (4th Cir. 1973); *Environmental Defense Fund Inc.* v. *T.V.A.*, 339 F.Supp. 806 (E.D.Tenn. 1972), aff'd 468 F.2d 1164 (6th Cir. 1972) (Tellico Dam I)

and 371 F.Supp. 1004, 1010 and 1014 (E.D.Tenn. 1973), aff'd 492 F.2d 466 (6th Cir. 1974) (Tellico Dam II). This view is best stated in *Ellis* v. *Montgomery*, supra, at 521:

> "It is readily apparent from the above minimal information that persons removed from making initial decision such as the President, the CEQ and the public, can have no way of ascertaining as comtemplated by NEPA the justification for or desirability of this project, since what costs are allocated to what items and what amounts of benefits are claimed from others are not in the EIS. The information may be somewhere in the files of the SCS, but this cannot satisfy the requirement of NEPA that it be made available to public officials removed from the initial decision making process and to the public in general."

4. This Court should require an EIS to be updated when, as here, intervening events make an EIS obsolete during the passage of nearly three years between the EIS and initiation of construction

It was error not to require the Corps of Engineers to draft a new EIS since the three year delay between funding and construction allowed the EIS to become obsolete because of intervening circumstances. NEPA at least least requires that the EIS be amended and/or updated and be provided again to all agencies for comment. Such is required by Section 101(b) and 102 of NEPA. It was plain error and in disregard of the Congressional mandate of NEPA.

Besides violations of NEPA there are other serious errors for which this court should grant this writ and decide the issue.

1) The Federal defendants misinterpreted the applicability of the Federal Water Pollution Control Act as

amended 1972, 33 U.S.C. 1251 et seq. 33 U.S.C. 1252(b)(3) provides "the need for and the value of storage for water quality control shall be determined by the administrator, and his views of those matters shall set forth in any report or presentation to Congress proposing authorization of *construction* of any reservoir including such storage."

The Hillsdale project was authorized by the Flood Control Act of 1954, Public Law 87-780. During 1966 and 1967 Congress appropriated funds for restudy during fiscal years 1966 and 1967. The Hillsdale project entered the advanced engineering and design phase and Congress appropriated funds for such planning for fiscal years 1968 through 1972. On August 25, 1972, funds were appropriated by Congress to initiate construction, including land acquisition of the project. On October 18, 1972, Public Law 92-500 (1972 amendments to the Federal Water Pollution Control Act) was enacted. In the spring of 1973 as well as the spring of 1974, the Corps of Engineers for the purpose of further appropriations of the proposed project reported to Congress on the status of the Hillsdale project, indicating the project was still zero percent complete. Subsequent to each presentation Congress appropriated funds for the construction of the Hillsdale project, as all the necessary funds to complete the construction had not yet been appropriated.

Because Congress, by PL 92-500, adopted new policies for the abatement of pollution in the streams and rivers of our nation, some traditional methods of achieving similar purposes were abandoned and others required reexamination. For the obvious reason of preventing a wasteful duplication of expenditures in water resource projects where otherwise substantial funds might be spent on storing water in federal reservoirs for water quality releases under the old low flow augmentation policy, Congress re-

quired EPA to make a determination as to the need for such storage where it was expected that water pollution would be abated by other more direct means. In fact, since October 18, 1972, when PL 92-500 became effective the Environmental Protection Agency has studied the need for, value of, and impact of storage for water quality control in federal reservoir projects pursuant to Sec. (b)(3) and not a single project so studied by EPA has resulted in construction with storage for water quality control as a project purpose (Finding of Fact No. 26).

The importance of implementing this Congressional policy of avoiding needless expenditures for water storage was strikingly applied to the Hillsdale project by the testimony of Gerald A. Stoltenberg, Chief of the Water Data Analysis Section of the Kansas Department of Health and Environment. Stoltenberg testified that the water downstream from the Hillsdale dam site is tested periodically and that as of October, 1972 there were no significant water problems in Bull Creek (Tr. at 21). Furthermore, Stoltenberg knew of no changes as of the time of trial (Tr. at 21-22). Stoltenberg testified that there were no health related problems with the water in Bull Creek (Tr. at 24), that there were no significant pollution problems in the Marais des Cygnes of which Bull Creek is a tributary (Tr. at 26), that the City of Paola, located on Bull Creek, was not creating a water quality problem (Tr. at 23) and that the low flow augmentation policy of the Corps would produce only minimal benefits (Tr. at 33) by reducing turbidity and improving aesthetics. Thus the question of whether storage for water quality purposes is needed or has any significant value at the Hillsdale project is important and should have been determined by the Administrator of EPA.

PL 92-500 requires that the determination of the Administrator of EPA as to the need for storage for water

quality control purposes shall be included in "any report or presentation to Congress proposing authorization or construction of any reservoir including such storage." There were several reports and presentations to Congress proposing construction of the Hillsdale project after the enactment of PL 92-500. Approximately six months after the effective date of the statute officers of the Corps of Engineers appeared before Congress concerning the Hillsdale project. Among the reports and presentations to Congress were Project Justifications (P. Exs. 18, 21) which indicated that as of early 1973 the project was zero per cent complete and that construction was scheduled to start in late 1973. The Administration requested an appropriation of One Million Dollars for construction of the Hillsdale project, which funds were to supplement those that had been appropriated by Congress on August 25, 1972 and subsequently impounded or placed in budgetary reserve. Pursuant to these presentations to Congress proposing funds for the initiation of construction in late 1973, funds were appropriated. Construction was not, however, initiated because the funds appropriated by Congress remained in budgetary reserve until some time after October 1, 1973. In addition, since the project included water storage for water supply uses by local units of government, primarily towns and rural water districts, neither land acquisition nor construction could proceed until a contract had been signed by some local unit of government obligating itself to repay the federal government for the additional costs of such storage for water supply uses. Such a contract had not been signed in 1973, and therefore, land acquisition and initiation of construction of the Hillsdale project could not proceed.

In the following year, the Spring of 1974, officers of the Corps of Engineers again testified concerning the Hills-

dale project and once again reports and presentations were made to Congress, including Project Justifications (P. Exs. 22, 24). These presentations again reported that the project was zero per cent complete. Colonel Rush, testifying for the Corps of Engineers, stated that a contract for repayment of the costs of water supply having been finally signed, land acquisition was expected to commence in June, 1974, and such acquisition would "constitute initiation of construction." (P. Ex. 17).

Thus, after the enactment of PL 92-500, representatives of the Corps of Engineers appeared before Congress on several occasions seeking funds for the construction of the Hillsdale project when, as a matter of law, they were unable to proceed with the project. Because of the requirements of the Water Supply Act of 1958 as amended by PL 87-88, 43 U.S.C. Sec. 390a, construction of the project could not proceed until the finalization of a contract with local interests for the repayment of the additional costs of storage for water supply purposes. On each of these occasions the Corps of Engineers reported that construction of the Hillsdale project would commence at sometime in the future, a date that was frequently postponed. On each such presentation to Congress the representatives of the Corps of Engineers proposed that Congress appropriate funds for construction of the Hillsdale project that would be utilized as soon as legal obstacles, such as the cost-sharing contract for water supply, had been eliminated. These appearances before Congress and the documents submitted in connection therewith constituted reports or presentations to Congress proposing construction of the delayed Hillsdale project and, therefore, PL 92-500 by its very terms required the administrator of EPA to determine the need for the storage for water quality control purposes that was included in the Hillsdale plans. Such a determination was not made.

The only cases dealing with the applicability of Sec. 102(b)(3) of PL 92-500 to authorized reservoir projects are *Cape Henry Bird Club* v. *Laird*, 359 F.Supp. 404 (W.D. Va. 1973), aff'd, per curiam, 484 F.2d 453 (4th Cir. 1973), *State of Ohio ex rel. Brown* v. *Callaway*, 497 F.2d 1235 (6th Cir. 1974), and *Sierra Club* v. *Froehlke*, 392 F.Supp. 130 (E.D.Mo. 1975). The *Cape Henry* case held that where land acquisition had begun in 1967, actual construction in 1968, and where the 47 Million Dollar project was thirty per cent (30%) complete at the time of enactment, PL 92-500 did not apply. In the Hillsdale project, however, land acquisition did not commence until eighteen (18) months after the enactment of PL 92-500 and actual construction did not begin until six (6) months after the first land was acquired. Thus, the rationale of *Cape Henry* supports the applicability of PL 92-500 to the Hillsdale project. Such an application was required by the *Callaway* case to two Corps of Engineers projects where the Court held:

> We believe that the failure of the Corps to obtain the determination from the Administrator required by 33 U.S.C. Sec. 1252(b)(3) is not, as the Court determined, 'speculative'. Moreover, we are reluctant to prohibit persons from challenging expected violations of water quality standards until reservoirs are actually constructed if it is alleged that the present plan for construction will necessarily cause such a violation.

For these reasons PL 92-500, by its terms, should have been applied to the Hillsdale project and until an evaluation of the need for water storage for water quality control purposes is made by the Environmental Protection Agency construction of the dam should be enjoined.

The Administrator, the head of the Environmental Protection Agency, construed 33 U.S.C. 1252(b)(3) as not requiring an evaluation for projects as to which construc-

tion had been authorized and construction funds appropriated prior to October 18, 1975, the date of the enactment of PL92-500. The administrator as a result did not comply with 1252(b)(3).

Although an Agency's interpretation of a complex and complicated statute, if reasonable, should be upheld, the plain language of 33 U.S.C. 1252(b)(3) is neither complex nor complicated. This section says "*any* report or presentation to Congress proposing authorization *or* construction of any reservoir." To allow such interpretation to stand ignores the clear and ambiguous language of the statute. This court should review the decision of the Tenth Circuit. It should at least have been required that the EIS state that the FWPCA as amended in 1972 was not applicable and why it was not applicable. *Cape Henry Bird Club* v. *Laird*, 359 F.Supp. 404, 419 (W.D.Vir. 1973).

2) The Water Supply Act of 1958 (PL87-88) provided in part "that not to exceed 30 percent of the total cost of any project [the cost] may be allocated to anticipated future demands where state or local interests give reasonable assurances that they will contract for the use of storage for anticipated future demands within a period of time which will permit paying out the costs allocated to water supply within the life of the project." This part of the statute is construed as requiring state or local government to commit themselves by definite contractual obligations (S.Rept. No. 353, 87th Cong., 1st Sess. p. 9).

As amended in 1961, the Water Supply Act now provides "that not to exceed 30 percentum of the total estimated cost of any project may be allocated to anticipated further demands where the state or local interests give reasonable assurances, and there is reasonable evidence, that such demands for the use of such storage will be made within a period of time which will permit paying

out the costs allocated to water supply within the life of the project." (43 U.S.C. 390b (b)).

Although the applicable agency could still obtain reasonable assurance by entering into firm contracts, in this case only an option contract was executed. Further, the Corps of Engineers had not made its own study or determination (Tr. at 402) but was relying on the option contract and affirmative statements of the Kansas Water Resources Board which had not made its own study of the need for the future water supplies in the Hillsdale area (Tr. at 840, 849, 860).

As stated in House Report 675, 87th Cong., 1st Sess., 107 Cong. Rec. 12474: "The Senate amendment will permit the federal agency concerned to make its own determination of future water supply needs and, on the basis of such determination, to include capacity in a project without the definite contractual commitments from the state or local interests."

It is clear from the record at the trial that neither a firm contract nor an objective determination had occurred so as to allow any cost of the project to be allocated to anticipated future demands. The decision by Tenth Circuit is therefore in direct contravention of the Water Supply Act as amended in 1961. This court should grant this writ to review this plain error.

5. The Corps of Engineers failed to comply with the Fish and Wildlife Coordination Act of 1958, 16 U.S.C. 661 et seq.

It has been held that compliance with NEPA is compliance with this Act. *Environmental Defense Fund Inc.* v. *Froehlke*, 473 F.2d 346, 356 (8th Cir. 1972). It would then follow that if the Corps of Engineers has not complied

with the Fish and Wildlife Coordination Act, it has not complied with NEPA. It is further asserted that petitioner may assert this non-compliance as a violation of not only NEPA but this Act and request the court to enjoin the Agency from action which will violate this Act.

16 U.S.C. Section 662(a) requires the Corps, in good faith to consult with other agencies (U. S. Fish and Wildlife Service, Dept. of the Interior and the appropriate state agency) with a view to conservation and development wildlife resources. More importantly construing 16 U.S.C. 662(c) and 663(a) together, the Corps may not proceed further with the project until an adequate mitigation plan is proposed and presented to Congress. It appears clear that the legislative intent of the Act was that a plan of mitigation be submitted to Congress by the agency when Congress is asked to appropriate funds for the project itself (Senate Report No. 1981, U. S. Code Cong. & Admin. News, 85th Cong., 2nd Sess., 1958, p. 3446. Not only does the Senate Report so say but also it would be almost fruitless not to provide funding for whatever mitigation plan is proposed in order that the work could proceed concurrently with the project, should Congress desire to provide such mitigation. *Akers* v. *Resor*, 339 F.Supp. 1375, 1380 (W.D.Tenn. 1972).

From the record in the case it is abundantly clear that neither an adequate consultation with the appropriate agency occurred nor was there a development of any mitigation plan consistent with the purpose of the project (Tr. at 151, 171, 183, 213) nor was any mitigation plan submitted to Congress for its review. Further, even if such mitigation was too costly to adopt or inconsistent with the purpose and plans of the Hillsdale project, such should have been set out in the final EIS, as well as the non-intention to submit any plan to the Congress.

Again Congressional mandates and policies have been ignored by the United States Court of Appeals for the Tenth Circuit.

CONCLUSION

Both the Tenth Circuit and District Court have ignored the intent, purpose and mandates of the various above discussed statutes. There is much confusion and lack of uniformity as to the proper interpretation of these various statutes. By granting this Writ the Court could end much of this confusion.

For these reasons and those set forth above, the Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 74-209-C5

SAVE OUR INVALUABLE LAND (SOIL), INC., et al.,
Plaintiffs,

vs.

COLONEL WILLIAM R. NEEDHAM, District Engineer, et al.,
Defendants,

and

CITY OF OLATHE, KANSAS, et al.,
Defendants-Intervenor.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed April 8, 1975)

STATEMENT

This suit was instituted by plaintiffs on October 22, 1974, as a class action, when they filed a complaint seeking injunctive and declaratory relief to restrain the defendant officers of the United States Corps of Engineers from entering into construction contracts, making land purchases, initiating condemnation of real property, beginning of construction of administrative facilities, site preparation, and other activities relating to the Hillsdale Dam and Reservoir Project on the Big and Little Bull Creeks and their tributaries as they flow through Miami and Johnson Counties, in Kansas.

Jurisdiction exists under 28 U.S.C. §1331(a), 28 U.S.C. §1361, and 5 U.S.C. §§701-706.

An application by plaintiffs for a preliminary injunction was denied on November 11, 1974, subject to plaintiffs' rights to renew the same.

Discovery procedures were utilized by the parties, issues were developed by the pleadings and the case was assigned for trial before the Court beginning on February 27, 1975. The trial occupied four trial days. The Court took the matter under advisement and requested the parties to submit Requested Findings of Fact and Conclusions of Law. The parties requested oral arguments of the case. The request was granted and oral arguments were presented on March 19, 1975.

The parties submitted a lengthy stipulation (Doc. 50) dealing with facts which the Court is considering in reaching its Findings and Conclusions.

Neither party has requested the Court to determine whether the action should be maintained as a class action under Rule 23(c)(1). The Court nevertheless finds that individual plaintiffs appear to have sufficient interest for themselves and those similarly situated, and have the right to make claims typical of those whom it is alleged are representative of the class. Therefore, the Court will, on its own initiative, determine that the action shall proceed on a class basis. *Citizens Environment* v. *Volpe,* 364 F.Supp. 286 (D.C.Kan.).

The Court further finds that the representation of the class in this case is adequate to determine the issues involved and that further notice is not necessary to protect the interests of any other person who might be affected by the rulings or judgment herein. Nor is such notice required. *Northern Natural Gas* v. *Grounds,* 292 F.Supp. 619 (D.C.Kan.).

The Hillsdale Project was authorized by Congress in 1954 as one segment of a nine-part reservoir system in

the Osage-Marais des Cygnes River Basin. Initially, its primary purpose was flood control. Early in 1966 the project was deferred by the Corps of Engineers for restudy and Congress appropriated funds for that restudy during fiscal years 1966 and 1967. During the period from 1968 through the spring of 1973 the project was in the advanced engineering and design stage.

On August 25, 1972, funds were appropriated by Congress to initiate construction, including land acquisition, of the Hillsdale Project. The funds were placed in budgetary reserve by the Corps and not then expended. Before the funds could be expended for construction of any project, including water supply provisions for present demand, state or local interests were required to contract to pay for cost of such provisions in accordance with the requirements of 43 U.S.C. 390b. Shortly after October 1, 1973, funds for the project were released from budgetary reserve but construction could not begin until a contract had been signed between the government and some local interest for reimbursement of the costs of storage for water supply, pursuant to the requirements of the Water Supply Act of 1958, as amended in 1961 by P.L. 87-88 (43 U.S.C. 390(b)). Such a contract was signed and approved with an agency of the state of Kansas on April 6, 1974. Land acquisition for the project was started with the purchase of tracts during June, 1974, and condemnation proceedings were commenced to acquire several tracts on December 2, 1974. A contract for construction of administrative facilities has been let and construction is planned to commence as soon as weather permits.

The situation is typical of many, if not all proceedings to establish a project similar to Hillsdale. The owners and occupiers of the land to be acquired must abandon their property and their homes. In many instances facilities

and improvements have been developed which cannot be replaced. The trauma of dislocation is not an element for which adequate compensation may be provided and the rules which the courts must follow do not permit consideration of evidence which may greatly enhance the value of the property to the owner or disclose substantial damages to him, but does not bear on the market value which is the criteria that must be followed in awarding just compensation. This value must be determined by what a mythical buyer who didn't have to buy the property would pay a mythical seller who didn't have to sell it. Such a determination must ordinarily be based on comparable sales made in the community within a reasonable time of the taking. It is understandable that plaintiffs and the class they represent would try to avoid the consequences of government action contemplated by the development of the project in this case.

On the other hand is the alleged need for the public improvement, whether for flood control, water supply, recreation, or to meet other requirements deemed essential for the public welfare. It should be made clear that this Court may not reassess the actions of Congress, the CEQ, or the Department of the Army in developing this project for construction and making appropriations to construct it for the purposes found proper by them.

The review of the action of the Corps of Engineers which this Court affords the parties is strictly limited to a consideration of whether there was a good faith compliance with the legal requirements of the environmental impact statement. *National Helium* v. *Morton*, 486 F.2d 995.

The record before the Court discloses that some of the plaintiffs have over a considerable period of time taken action to oppose the authorization of the Hillsdale Project.

Several appearances were made before Congressional Committees considering the matter. Congress nevertheless has decreed the creation and development of the project and has made appropriations to carry out the legislation enacted for that purpose. This Court may not reassess the wisdom of Congress in adopting the course it took.

This Court has not been vested with either the power or jurisdiction to evaluate the merits or balance the conflicts revealed by an appropriate environmental impact statement. This Court may only inquire as to whether the requirements of NEPA were satisfied in a reasonable and good faith manner. The issue of propriety of the project is not one for this Court's consideration. The forum in which the objections to the continued development of the project may be heard is the Legislative Branch of the Government inaugurating it.

In *National Helium* v. *Morton*, supra, the standard to be applied was discussed. There it was said at 1001:

> "The specified procedural requirements of NEPA are delineated in 42 U.S.C. § 4332. Section 4332(2) (A)-(H) imposes specific procedural duties on federal agencies, one of which is the duty of preparing a detailed impact statement to accompany any recommendation for a major federal action significantly affecting the environment. The requirements of this impact statement contained in § 4332(2) (C) include five specific areas to be covered in the impact statement:
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

Further quoting from page 1002:

"In summary, then, our view is that the review of FES is limited to the following:

(1) Whether FES discusses all of the five procedural requirements of NEPA.

(2) Whether the environmental impact statement constitutes an objective good faith compliance with the demands of NEPA.

(3) Whether the statement contains a reasonable discussion of the subject matter involved in the five required areas."

RULINGS OF COURT ON ISSUES PRESENTED

Plaintiffs present an array of defects alleged to exist in the FES and in its consideration by the government agencies involved. Plaintiffs' complaint contains eight causes of action. The contentions may be generally summarized, as follows:

1. The defendants have failed to properly calculate the benefit-cost ratio, have failed to include cost elements that should be included and have overestimated benefits which are claimed to accrue from the project.

2. Defendants have not calculated indirect costs for wildlife habitat which should include provision for mitigation for losses to wildlife due to the construction and

inundation by the Reservoir while at the same time calculating benefits for fish and wildlife enhancement.

3. Defendants utilized a systems approach rather than an incremental approach for calculating flood control benefits.

4. Defendants did not perform a detailed study to support claimed benefits from future growth of value of property to be protected by the project and thus the benefit-cost analysis of the project is based on unsupported conjecture.

5. Defendants did not perform detailed study to support estimate that flood control benefits for preventing non-crop and transportation damages would increase during the life of the project and benefits projected are based upon unsubstantiated conjecture.

6. The benefits attributed to water supply of the project were exaggerated because defendants did not properly adjust benefits of water supplies for expected period of nonuse.

7. Defendants failed to take into consideration the value of timber to be inundated by the project.

8. Defendants in calculating the benefits and costs of the project, reduced project benefits for a return of investment on land in the acquisition area but not for lost production attributable to capital and labor.

9. Defendants failed to include as an adverse effect of the project the adverse effect of the dam on downstream fishing.

10. Defendants underestimated the operation and maintenance costs associated with the project.

11. The benefit-cost ratio of 1.16 to 1.0 is a benefit-cost ratio generally not recommended for construction of projects.

12. Defendants have not studied and determined the need for, the value of, and the impact of storage for water quality control at the project.

13. Defendants have developed no further environmental impact statement since February 2, 1972, when the final EIS was filed.

14. No study was made or reported of reasonable and viable alternative water supplies which could be available.

15. The statement does not fully and adequately discuss the impact of the project on archaeological and historic sites within the Reservoir area.

16. The statement does not discuss the impact of removing nearly 14,000 acres of primary agricultural land from production upon the price of food or upon the economics of the area affected.

17. The statement does not discuss various flood control alternatives such as a dry dam utilized only for the storage of flood waters.

18. The statement does not reflect a benefit-cost analysis of non-structural alternatives to the flood control benefits of the project.

19. The statement is silent as to alternatives for reducing downstream pollution by preventing the introduction of effluents into the stream.

20. The statement does not discuss nor reflect the alternative of providing water quality control by using new or enhancement of water treatment facilities downstream.

21. The statement does not discuss nor reflect the study and development of the effects of growth of population and increased commercial activity on the surrounding environment.

22. There is no discussion of a viable mitigation plan to offset the fish and wildlife losses that will be associated with the project.

23. Defendants have failed to prepare an adequate detailed statement required by Section 102(2)(c) of NEPA.

24. Defendants have failed to give due regard for wildlife conservation.

25. Construction of the project would adversely affect the lives of people within the meaning of Section 1 of the Act of June 22, 1936, 33 U.S.C. §701a.

26. Survey of historical and archaeological data is not being undertaken or is wholly inadequate under provisions of Section 2(b) of the Act, 16 U.S.C. §469 (now 16 U.S.C. §469a).

27. The right of plaintiffs to enjoy beauty, to live in an environment that preserves the unquantified amenities of life protected by the 5th Amendment is being invaded and the action of defendants is unreasonable, arbitrary and capricious, and without due process of law.

28. The acts of defendants are ultra vires, arbitrary, capricious and unreasonable.

29. Defendants failed to make a study and determination of the need for, the value of, and the impact of storage for water quality control and no such report was made to Congress proposing the authorization or construction of any reservoir, including storage for water quality control.

30. The Impact Statement has become obsolete.

31. The 1972 Amendments to the Water Pollution Control Act, 92-500, apply.

32. The Calculation of Project Economics is arbitrary and defendants have not fully discussed basis of their calculations.

33. Defendants have not met requirement of P.L. 85-500 (43 U.S.C. §§390, et seq.) requiring a signed contract for water storage supply.

34. Defendants have not given environmental factors equal footing with economic and technical matters.

35. Defendants should be required by an Order of Mandamus to conduct a study for water quality control purposes pursuant to P.L. 92-500.

The final Environmental Impact Statement (EIS) consists of 27 pages of single space material, plus 29 pages of comment from various governmental agencies and interested parties.

Without setting out every detail of the statement, it is sufficient to note that the environmental impacts are described as:

"3. a. *Environmental impacts*: Stream control and flow alteration; temporary soil erosion; turbidity and noise during construction; downstream flood control; provision of a 4,580-acre lake; altered traffic patterns; control of siltation; development of mudflats; municipal and industrial water supply and water quality releases; contributing to water supply shortage at a State waterfowl area; relocation of 92 family units."

Adverse environmental effects were stated as:

b. *Adverse environmental effects*: Loss of stream habitat; loss of wildlife habitat; increased residential and commercial activities; water supply shortage at State waterfowl area; relocation of family units."

Alternatives were set forth as:

"4. *Alternatives*:

a. Alternate lake sites.

b. No action.

c. Single purpose water supply reservoir.

d. Flood plain zoning.

3. Levees and channelization."

A draft statement was furnished to numerous agencies of the state of Kansas, the Federal Government, and to one of the plaintiffs, Dr. Hall. The draft statement went to CEQ on September 17, 1971, and the final statement was filed on February 2, 1972.

The statement describes in considerable detail the location and projected operation of the Dam and Reservoir upon installation, the relocation of roads, public utility installations which would be necessary. Further described are items relating to road and bridge building, recreational areas, water supplies, sanitary facilities and boat launching ramps, and other public use areas.

The land to be acquired is described. The farm products, principally grain, are grown on bottom lands; the uplands are used primarily for grazing. Reference is made to woods and timber growing along stream banks and the extent of such growth. The woodland is described as prime habitat for wildlife and birds. The different varieties of game and birdlife are enumerated. The presence of several kinds of fish is set out and the area is described as one which furnishes fishing, hunting, and general recreational opportunities. Mention is made that known archaeological sites are being excavated by a team from Kansas University whose work is expected to be completed before impoundment takes place. The likelihood of residential development is considered because of the near proximity to the Kansas City Metropolitan area which will occur whether the project is constructed or not. Furthermore, the shortage of municipal water supplies of the cities and towns in the basin area is stated.

Impacts of the proposed action are set forth in detail. Beginning on page 5 of the EIS we find an extended discussion of the location of the project, the kind and types of lands, the crops grown, the vegetation, the timber, the habitat for wildlife and birds, including waterfowl, the location of the nearby County Game Management area maintained by the Kansas Forestry, Fish and Game Department.

Little Bull and Big Bull Creeks are described, including the kinds of fish and intermediate organisms. Further allusion is made to archaeological sites and their development. It is disclosed that upland game would be displaced by the impoundment but that fishing would be substantially improved.

Construction of the Dam and clearing of timber would cause some temporary adverse impacts, including erosion, increased noise levels and exhaust emissions.

The statement discusses the proposition of flood control and the various considerations which enter into this part of the project purpose. The likelihood of residential, commercial and recreational development, and the impact from these is discussed, including need for more roads, more water, sewer and police protection.

The impact on downstream property is discussed, including regulation of stream flow; water quality is discussed, and the assurance of the Kansas Water Resources Board of payment for entire water allocation to supply needs of the area.

Downstream flood protection on the Marais des Cygnes River, of which Bull Creek is a tributary, is described. Also mentioned is the fact that wildlife habitat in the Marais des Cygnes waterfowl area may be deprived of adequate water, and remedial installations are discussed. Displacement of some 92 families from their farms

is pointed out. Downstream fishery habitat would be disturbed and might not benefit from the installation.

There is an extended discussion of efforts proposed to lessen adverse impacts.

There is also a discussion of environmental effects which cannot be avoided should the proposal be implemented. This discussion relates to the items described above.

Alternatives to the proposed action include four alternative sites examined. The alternative of no action would result in no benefit for downstream flood control, shortage of water supply for the area, and water quality releases would be foregone. A single purpose reservoir was discussed as was flood plain zoning in conjunction with flood insurance and flood prevention which could be provided by construction of levees and channel work.

The relationship between short term uses of man's environment and enhancement of productivity is discussed as it relates to flood control, to food production, to recreational opportunities, and the very important need for water supply and water quality storage.

The irreversible and irretrievable commitment of resources is discussed. The discussion relates to the impact on different items referred to above.

It appears no public meetings were held but various government agencies and conservation groups were furnished with the draft statement. Comments were received and considered from Kansas Water Resources Board, Kansas Forestry, Fish and Game Department, Kansas Highway Department, National Park Service, Bureau of Mines, Bureau of Outdoor Recreation, Bureau of Sport Fisheries and Wildlife, Soil Conservation Service, Environmental Protection Agency, Kansas Ornithological Society, and Dr. E. Raymond Hall.

To these comments adequate responses were included in the final statement. The detailed responses to Dr. Hall's comments provide a much enlarged discussion of the matters previously described.

THE BENEFIT-COST RATIO

Plaintiffs would have this Court review a great variety of suggested cost elements they contend were omitted from the impact statement and determine whether the defendants have overestimated the benefits which are claimed to accrue from the project.

The Court finds that the benefit-cost ratio of the Hillsdale Dam and Reservoir is 1.16 to 1 and that Congress has determined conclusively in ratifying this project and in appropriating funds thereafter, that the benefit-cost ratio of the project is favorable within the meaning of the Flood Control Act of 1936, 33 U.S.C. § 701(a). See *Sierra Club* v. *Stamm*, 507 F.2d 788, 794; *Environmental Defense Fund* v. *Tennessee Valley*, 371 F.Supp. 1004.

WATER QUALITY CONTROL

Plaintiffs insist that defendants have not studied and determined the need for, the value of, and the impact of storage for water quality control on the project. They also contend that the 1972 Amendments to the Federal Water Pollution Control Act, P.L. 92-500 (33 U.S.C. 1251, et seq.), requires this to be done.

First, the EIS which was submitted for comment and suggestions, makes reference to water quality control and discusses its influence on downstream water quality as one of the impacts of the proposed action in at least six different instances. Mentioned is the alteration of downstream fish habitat, the reduction of downstream sediment, and allocation of the water impounded for water quality control. Also discussed was necessary clearing of the

Reservoir area to minimize water quality problems. It would appear that substantial consideration was given to water quality.

However, the plaintiffs say that defendants since have not complied with the requirements of P.L. 92-500 (33 U.S.C. 1251, et seq.) by studying the need for water quality control and by submitting to Congress a report of such study, and that the Court should enjoin further development and construction on the project until this is done. The application of this statute has been held and determined not to apply by the Corps of Engineers and the Environmental Protection Agency when it appears, as here, that the project was not in the survey or planning stage and was not before Congress for authorization or construction, those stages having passed.[1] Here, the Hillsdale

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1. The Environmental Protection Agency (EPA) in November, 1973, circulated to its regional administrators and to the Corps of Engineers the following policy guide. In regard to 16 U.S.C. §1252, it was stated:

> "Determinations regarding water quality control storage in authorized projects will be limited to those projects for which funds to initiate construction, including land acquisition, had not been appropriated prior to passage of P.L. 92.500 [16 U.S.C §1252]. Therefore, item 1, page 2 of attachment 1 is changed to read as follows: 'Notwithstanding any previous recommendations concerning water quality storage made by EPA or its predecessor agencies, this policy shall be applied by EPA when reviewing and commenting upon reports and environmental statements during both the preauthorization and post-authorization planning phases of federal projects. Accordingly, EPA will apply Section 102(b) and the implementing subject policy to those reservoir projects not funded by Congress for construction, including land acquisition, as of October 18, 1972—the effective date of the act.'
>
> "For projects in construction status, the Corps will give the same type of consideration to EPA's views on water quality storage that are occasioned by review of an environmental impact statement or other regular coordination procedures as it does the views of other agencies on matters within their expertise. Consideration given to EPA's views will be reflected in the Environmental Impact Statement or addressed in other appropriate ways."

project had been authorized and funded for construction, including land acquisition, prior to the effective date of the amendments contained in P.L. 92-500. This determination, the Court believes and finds was objective, reasonable and made in good faith. See *Cape Henry Bird* v. *Laird*, 359 F.Supp. 404, l.c. 421, affirmed 484 F.2d 453, l.c. 454. Compliance with P.L. 92-500 is not required in this case.

OTHER COMPLAINTS

Plaintiffs contend that the defendants have a responsibility to develop and bring up to date all circumstances having any impact upon the environment affected by the Hillsdale Project. Although plaintiffs contend that several changes were made in the plans for allocation of the impounded water and for reassessment of the costs, there has been in fact no fundamental change in the location of the project, its dimensions, its utilization and the other factors reviewed and commented upon in the EIS filed in 1972, following which Congressional action of authorization and appropriation took place. Plaintiffs have failed to demonstrate that any change of circumstances having a substantial bearing on the environment sufficient to require a restudy of the project has taken place. The Court must conclude that the environmental consequences of this project were reasonably and practically evaluated in the EIS filed by defendants. Should the Court establish a rule that every delay in activating the construction and development of a project required a restudy of the environment, then in all likelihood, no public projects could be developed. The admonition of Congress that it is the continuing responsibility of the Federal Government to use all practicable means consistent with other considerations or National policy to improve and coordinate Federal plans, functions, etc., suggests that in dealing with

these problems, a practical approach is necessary and that it must be consistent with other considerations of National policy. We would believe and now hold that this applies to water supplies, water quality, recreation, and other declared objectives included within the purposes of this project.

In any event, it is the responsibility of Congress to determine whether or not a particular project is proceeding in accordance with its authorization. *Sierra Club* v. *Froehlke* (E.D.Mo.), 3-19-75, No. 72-C-584(3).

The objection is raised that no study was made of reasonable and viable alternate water supplies. The impact statement contradicts this complaint. Four alternative sites in the area were considered and rejected in favor of Hillsdale. Plaintiffs contend that water from the Kaw River Watershed should have been studied as an alternative water supply. Evidence in this case discloses that the expense and the doubtful adequacy of a sufficient water supply from the Kaw River aquifer condemns it as a possibility. The defendants were not required to consider every conceivable possibility in making their decision on Hillsdale. Only those alternatives reasonably available need be considered. The statement as a whole gives sufficient information concerning reasonable alternatives for evaluation of their relative merits.

The complaints that the statement does not discuss the impact of moving nearly 14,000 acres of primary agricultural land from production upon price of food and upon the economics of the area is without merit. The statement sufficiently covers this item. Nor does the charge that the statement fails to discuss various flood control alternatives require consideration. This project is a multi-purpose installation and is largely justified because of the imminent need for an adequate additional water supply in the area.

This same observation must be made as to the claim that no study was made as to alternates for reducing downstream pollution by preventing introduction of effluents into the stream, or the failure of the statement to discuss alternatives for providing water quality control by using new or enhancement of water treatment facilities.

The claim that the statement does not discuss or reflect the study and development of the effects of growth of population and increased commercial activity on the surrounding environment is contrary to the facts. The environmental setting is discussed in the statement, including reference to the close proximity of the project to the Kansas City Metropolitan area, the fact increased residential development will be expected whether the project is established or not. Likewise, is considered the growth of population and increased commercial activities, together with alteration of traffic patterns and increased recreational activity.

Plaintiffs undertake to discredit the statement by suggesting that there is no discussion of a viable plan to offset the fish and wildlife losses that will be associated with the project. Actually, the statement describes in detail the existence of fish and invertebrates found in these slow-moving and intermittent streams and their replacement by a lake fishery which it is predicted will provide a larger variety of game and nongame fish. Evidence is hardly necessary to establish the well-known fact that fishing will improve substantially. This claim is not justified from the obvious facts. Nor is there anything contained in 33 U.S.C. §661, et seq., which changes this. The draft impact statement was submitted to the Bureau of Sport Fisheries and Wildlife and to the Kansas Forestry, Fish and Game Commission. Their comments are attached to the EIS submitted by defendants. Recommendations

of the agencies were adopted or received appropriate comment.

That the establishment of the project will adversely affect the lives of people who must leave and abandon the land area to be acquired for that purpose must be assumed. It is a hazard that exists to every person who may be displaced in such circumstances. The impact on such person frequently is very serious, as is true in this case. However, the fact that Congress has authorized and directed the construction of the project which in itself implies the acquisition of the property as necessary for the project, and the taking of possession of such property to the exclusion of those occupying it in the interests of the general welfare transcends any right the landowner might have under the terms of 33 U.S.C. §701a.

The rights of plaintiff to enjoy beauty, to live in an environment that preserves the unquantified amenities of life as claimed by them to be their right, protected by the 5th Amendment, is overcome by the Congressional mandate to construct this project. Such legislative action cannot be classed as unreasonable, arbitrary and capricious, and without due process of law.

This Court has, on several previous occasions, been required to rule on similar takings of property necessary to fulfill a Congressional directive. In the case of *United State* v. *1,490.50 Acres in Jefferson Co. (Griffits)*, T-3764, unreported (1966), is briefly stated the law on the subject.

> "Ordinarily a court has no power to review the advisability or necessity for taking property under Congressional Authorization. *Berman* v. *Parker,* 348 U.S. 26, 35-36. Nor can the court regulate or limit the quantity of land taken when that taking has been legislatively authorized. *United States* v. *Kansas City,*

159 F.2d 125, 129. Administrative discretion permitting the taking of land necessary for the project means, that land 'desirable', 'advisable', 'advantageous' or 'expedient'. *Rindge Company* v. *Los Angeles*, 262 U.S. 700, 709. *Old Dominion Land Company* v. *United States*, 269 U.S. 55, 66, 72, *United States* v. *Carmack*, 329 U.S. 230, 247, *Simmonds* v. *United States*, 199 F.2d 305.

"Ordinarily where a taking is authorized by Congress the only judicial issue involved is the determination of just compensation. *United States* v. *Miller*, 317 U.S. 369.

"This Court is bound to follow the principle frequently announced by the appellate courts that the determination of the necessity, character and extent of the taking of property for public use is a legislative and administrative determination not subject to judicial review. *Sweet* v. *Rechel*, 159 U.S. 380, 395."

There is no evidence to support the claim of plaintiffs that defendants acts are ultra vires, capricious or unreasonable. The Court must find from the record before it and the reasonable inferences that may be drawn from the facts established that defendants did not fail to make a proper and sufficient study and determination of the need for, the value of, and the impact of storage for water quality control.

Plaintiffs produced evidence at trial attempting to attack the sufficiency of the statement's treatment of archaeological losses which may possibly occur when the project is completed and water impounded. The reference to archaeological sites contained in the statement is brief but sets forth the conditions and circumstances relative to archaeological developments in the project. The testimony of witness Dr. Arthur Rohn, Chairman of the Anthropology

Department of the University of Wichita, discloses that there have been surveys made of the Reservoir area. Some 54 possible sites in the area have been recorded, 4 sites have been completely excavated, 5 have been tested. None have substantial significance. It is possible that the Nebo Hill culture might be developed but there are no identities of it in the area. He testified that in the Plains Woodland Classification only one site has been excavated; it is not completed. The witness has contracted with the National Park Service on two projects. It would be impractical to excavate every site and funds and time do not permit such extensive study. The witness stated that two or three years' time might be enough to complete the work presently outlined. He said the Corps had been very cooperative with him.

It may certainly be inferred from the record that there are no exceptionally unique findings in any excavations at the Hillsdale site. The artifacts found compare with those found in other parts of Eastern Kansas. These were the developments briefly disclosed in the statement. Actually, no archaeological findings disclose any particular significant results and the possibility that some might be found is highly speculative. Under the circumstances and the evidence, the Court finds that the impact statement's discussion of the archaeological impact resulting from the project is adequate.

The Court must find and determine from the record before it that the impact statement has not become obsolete, that the 1972 Amendments to the Water Pollution Control Act, P.L. 92-500, do not apply, that the calculation of the Project Economics is not arbitrary, that the requirements of P.L. 85-500 (43 U.S.C. §350, et seq.), have been met, that defendants have given environmental factors equal footing with economic and technical matters, and

that no order of mandamus is necessary or required for a water quality control study pursuant to P.L. 92-500.

Courts should not "fly speck" environmental statements. The preparation of such a statement calls for judgment and the judgment is the agency's, and a court can only require full, bona fide compliance with NEPA. *Lathan* v. *Brinegar*, 506 F.2d 677, 593 (9th Cir.) (sic).

The standard for judicial review in determining whether a federal agency fulfilled its requirements under NEPA is not an arbitrary and capricious standard but whether an objective good-faith effort to comply was made. In this case, the rule of reason must be adopted to test the sufficiency of environmental impact. See *National Helium* v. *Morton*, supra.

Ultimate decisions as to project must not be made by judiciary branch, but by executive and legislative branches, of government, and court should not substitute its judgment as to what would be best use of particular creek and its environs for that of Congress or of those administrative departments of executive branch which are charged by Congress with duty of carrying out its mandates; court's function is to determine whether environmental effects of proposed action and reasonable alternatives are sufficiently disclosed and discussed, and whether conclusions are substantiated by support of opinion and data. *Natural Resources Defense Council, Inc.* v. *Grant* (D.C. N.C.) 355 F.Supp. 280.

District Courts have obligation to review substantive agency decisions on merits to determine if they are in accord with NEPA but review is limited one for purpose of determing whether agency reached its decision after full, good-faith consideration of environmental factors made under standards set forth in NEPA. *Environmental Defense Fund, Inc.* v. *Froehlke* (8th Cir.), 473 F.2d 346.

There is no question that court may not substitute its judgment for that of responsible federal official in determining necessity or desirability of particular project; rather, court's function is limited to determining whether official's action followed necessary procedural requirements of NEPA. *Citizens for Mass Transit Against Freeways* v. *Brinegar* (D.C. Ariz.), 357 F.Supp. 1269.

The specific procedural requirements of NEPA as delineated in 42 U.S.C. §4332(2)(a)-(H), have been complied with and the impact statement complies with and includes the five specific areas to be covered under 42 U.S.C. §4332 (2)(C).

The procedures required by NEPA are designed to secure the accomplishment of the vital purpose of NEPA. The result can be achieved only if prescribed procedures are faithfully followed, grudging, pro forma performance will not do.

Congress has directed the Corps to build the Dam. The evidence supports the need for the project particularly as it relates to an adequate supply for the communities in the area. Such a supply must be developed. Its installation will have the same impact on the environment no matter where it is located.

The Court having heard the evidence, the arguments of counsel, having the stipulations of the parties and the briefs submitted, and on being fully advised in the premises, makes the following:

FINDINGS OF FACT

1. Plaintiff, Save Our Invaluable Land, Inc. (SOIL), is a nonprofit membership corporation organized under the laws of the State of Kansas. SOIL's membership consists of 60 individuals who own land required for the Hillsdale Lake, Kansas Project or in close proximity there-

to. SOIL exists to promote research and action, and to take action itself, to protect and enhance the natural environment, including the preservation of rivers, river basins, wildlife, and the quality of natural resources.

2. Plaintiffs Mary A. and William H. Sherwood, E. Raymond and Mary F. Hall, Robert W. and Ethel Mary Cundiff, Fred J. and Ileta V. Armstrong, and Melville R. and Mildred Dort own land required for the Project. These plaintiffs derive all or part of their livelihood from their land and wish to have their land preserved in its present state and wish to have continued use and enjoyment thereof.

3. Plaintiffs Kenneth J. and Mary K. Bingman own land adjacent to the Project. These plaintiffs assert that their land will be stressed by growth and pressure generated by the Project and desire that their land and the surrounding land be maintained in its present state so that they might continue to enjoy the benefits of the area.

4. Plaintiffs bring this suit as a class action on their own behalf and on behalf of all others similarly situated. Plaintiffs assert that there are questions of law and fact common to the class represented and that the plaintiffs will fairly and adequately protect the interests of the members of the class.

5. Defendant Colonel William R. Needham is the District Engineer, Kansas City District, Missouri River Division, Corps of Engineers of the United States Army. The Kansas City District and the personnel employed therein are under the immediate supervision of this defendant. Said District has the responsibility for construction of the Hillsdale Lake, Kansas Project with which this suit is concerned. Defendant Needham is an officer of the United States.

6. Defendant Lt. General William C. Gribble, Jr. is Chief of Engineers of the Corps of Engineers of the United States Army and exercises administrative supervision over the personnel and offices (sic) referred to in finding numbered 5. Defendant Gribble is an officer of the United States.

7. Defendant Howard H. Callaway is Secretary of the Army and as such exercises administrative supervision of the entire Department of the Army, including the Corps of Engineers and its agents, employees and officers referred to in finding numbered 5. Defendant Callaway is an officer of the United States.

8. Defendant Jerome Svore is Regional Administrator of the Environmental Protection Agency for Region VII which includes the site of the Project with which this suit is concerned, said region and the personnel employed therein are under his immediate supervision. Defendant Svore is an officer of the United States.

9. Defendant Russell Train is Administrator of the Environmental Protection Agency and as such, exercises administrative supervision of the entire Environmental Protection Agency, including its agents, employees, and officers referred to in finding numbered 8. Defendant Train is an officer of the United States.

10. Defendants-Intervenors are the Cities of Olathe, Paola, Springhill, Gardner, and Edgerton, Kansas, Rural Water District No. 2, Miami County, Kansas, Rural Water District No. 7, Johnson County, Kansas, Hillsdale Dam and Area Development Association, Inc., a Kansas non-profit corporation, and the Missouri-Arkansas Basin Flood Control and Conservation Association, Inc., a Kansas non-profit corporation. The defendants-intervenors allege that each has either economic or environmental interests that would be adversely affected if construction of the Project were to be suspended or terminated.

11. The amount in controversy, exclusive of interest and costs, exceeds $10,000.00.

12. This suit arises out of a water resource project known as Hillsdale Lake which the Corps of Engineers are constructing on Big Bull Creek near the town of Hillsdale. The Project is located in Miami County, Kansas. Big Bull Creek is a tributary of the Marais des Cygnes River, Kansas, which flows into Missouri, there named the Osage River. The Hillsdale Lake, Kansas Project was authorized by the Flood Control Act of 1954, Public Law 83-780, as part of a nine reservoir system, the basic purpose of which is to alleviate problems of flooding of towns and agriculture lands along the Marais des Cygnes River, the Osage River, the Missouri River and the Mississippi River.

13. The Hillsdale project was deferred by the Corps of Engineers for restudy in 1961 and 1966 and Congress appropriated funds for that restudy during fiscal years 1966 and 1967.

14. After completion of the restudy, the Hillsdale Project entered the advanced engineering and design phase and Congress appropriated funds for such planning for fiscal years 1968 through 1972.

15. The Project became available for construction start during fiscal year 1973.

16. Since the initiation of advanced engineering and design a benefit/cost ratio has been calculated for the Hillsdale Project each year by the Corps of Engineers.

17. On August 25, 1972, funds were appropriated by Congress to initiate construction, including land acquisition of the Hillsdale Reservoir Project. Those funds, however, were placed in budgetary reserve by the Corps of Engineers until October 1, 1973.

18. Among the Project purposes of the Hillsdale Reservoir is water quality control.

19. On October 18, 1972, Public Law 92-500 (1972 Amendments to the Federal Water Pollution Control Act) was enacted.

20. The Hillsdale Dam will be constructed by private contractors pursuant to contracts with the Corps of Engineers. The dam will consist of a rolled earth fill embankment, a gated outlet for discharging flows and a limited service spillway. Maximum height of the dam will be 75 feet above the valley floor. The reservoir will inundate 7,410 acres at full flood control pool and 4,580 acres of land at multi-purpose level.

21. The damsite and lake are located approximately twenty miles to the southwest of the Kansas City Metropolitan area. The Hillsdale area is starting to feel the effects of rural-suburban edge transition. If the area were left to normal development without the Project, increased residential development could be expected due to pressures from the Kansas City Metropolitan area.

22. The land in the area is typical of eastern Kansas with rolling uplands. The bottom lands are used for grain crops such as corn, milo, soybeans, and wheat. The uplands are used primarily for grazing. The vegetation is characteristic of the ecotone or edge-environmental where forest meets prairie. The mature woodland and other vegetation constitute prime habitat for wildlife and birds. Big Bull Creek is a slow-moving intermittent turbid creek having a medium quality fishery.

23. In 1965, the Public Health Service, Department of Health, Education and Welfare made a report of its study of the need for storage of water supply and water quality control for the Osage River Basin, Kansas and Missouri pursuant to the Provisions of 43 U.S.C. 390b and 33 U.S.C. 466 et seq. (Appendix, page 310.)

24. The report referred to in finding numbered 23 recommends storage in the Project for Water Quality Control. The Corps of Engineers conducted a restudy of the Project economics during Fiscal Year 1966 and as a result, storage in the Project was allocated for Water Quality Control on the basis of the Public Health Service recommendation. In 1969, the Federal Water Pollution Control Administration confirmed the need for storage for Water Quality Control. (Appendix, page 309.)

25. During Fiscal Year 1968 Congressional hearings on appropriations, the Corps of Engineers reported the benefits of the various Project purposes including storage for water quality control. (Appendix, page 428G). For Fiscal Year 1968, Congress appropriated the initial pre-construction planning funds, and for Fiscal Year 1972, the final pre-construction planning funds were appropriated. Project pre-construction planning cost expenditures for the Project have totaled approximately $1,100,000. Upon the completion of planning, Congress does not automatically appropriate funds to initiate construction but rather considers this stage of the Project as the beginning of a new process.

26. Since October 18, 1972, the Environmental Protection Agency has studied the need for, value of, and impact of storage for water quality control in reservoir projects and has recommended such storage for only one project, the Pocatalico River Basin Project of the Soil Conservation Service, and the SCS later eliminated storage for water quality control as a project purpose.

27. The Environmental Protection Agency recommends to construction agencies of federal projects the inclusion of storage for water quality control by flow regulation only where such storage is required as a supplement to application of the best available technology and is in

consonance with water quality management plans developed under the Federal Water Pollution Control Act or its Amendments.

28. Early in 1972, the President proposed a construction start for the Project during Fiscal Year 1973 Congressional hearings on appropriations. On August 25, 1972, Congress appropriated funds for a construction start for the Project. At this point, the Project was deemed to be under construction by the President and Congress. Once Congress funds a construction start, the Project is not considered again by Congress as a construction start. The only question before Congress thereafter, is the amount of the funds to continue construction, unless something extraordinary happens to change the situation. Congress appropriated funds to continue construction for Fiscal Years 1974 and 1975. Project construction costs incurred through November 18, 1974, are approximately $2,230,-000.00.

29. In testimony before the Subcommittee on Public Works of the Senate Appropriations Committee in the spring of 1974, Colonel Rush for the Corps of Engineers reported that land acquisition for the Hillsdale Project would possibly result in a closing on some tracts to be acquired by negotiation on June 21, 1974. Colonel Rush further stated: "Acquisition of this first tract of land will constitute initiation of construction." Under standard Legislative and Executive procedures, this project has been "under construction" since August 25, 1972, although physical construction of the dam has not commenced.

30. On October 18, 1972, the Federal Water Pollution Control Amendments (FWPCA) of 1972 became effective. Public Law 92-500, 33 U.S.C. 1252 et seq. These amendments provide that the Administrator of the Environmental Protection Agency shall determine the need for the value

of storage for water quality control in Corps of Engineers Projects. The Amendments further provide that the Administrator's views on this subject shall be included in any report or presentation to Congress proposing authorization or construction of any reservoir including such storage.

31. The primary sources of pollution on Bull Creek are the city of Paola, land surface runoff and feed lots. Paola discharges approximately .5 million gallons per day of waste but such discharge does not currently pose significant problems since Paola has a waste stabilization pond with a long retention time and long stabilization. Such treatment is primary form of waste treatment.

32. Under current laws and regulations the city of Paola is required to install by 1977 secondary municipal treatment facilities which in the case of Paola will consist of chlorination and some kind of filtration to reduce suspended solids.

33. The Kansas Department of Health is of the opinion that there are no health related pollution problems in Bull Creek and none are expected in the future.

34. The Environmental Protection Agency in not studying the need for, value of, and impact of storage for water quality control purposes in the Hillsdale Reservoir relies upon a November 12, 1973 memorandum of Mark A. Pisano, Director of the Water Planning Division of EPA. Prior to the issuance of this Pisano memorandum it had been the policy of EPA to study the need for, value of, and impact of storage for water quality control at reservoirs such as Hillsdale pursuant to a memorandum of February 7, 1973 from Robert L. Sansom, Assistant Administrator of Air and Water Programs for EPA. The Sansom memo instructed regional administrators that very few recommendations for storage for water quality control would result from the application of the EPA policy on studying

the need of, value of, and impact of such water quality control storage.

35. Pre-construction planning for the Project commenced in Fiscal Year 1968. On August 25, 1972, by virtue of Congressional appropriations, the Project entered the construction stage. The state of Kansas has committed itself, by way of contract, approved by the Secretary of the Army on April 9, 1974, to repay the allocated costs for the 53,000 acre-feet of the Project Water Supply Storage. Land acquisition commenced in June 1974 and bids for construction of the administrative facilities were opened on October 30, 1974. That contract was awarded on December 2, 1974. The Corps of Engineers propose to advertise for first stage construction on or after March 19, 1975 with bid opening for about 30 days thereafter.

36. By letter of January 31, 1973 Paul D. Barber of the Corps of Engineers advised officials in the Hillsdale area that funds for the initiation of construction of the project were expected to be available in the spring of 1973. Barber also wrote "Before any of these funds may be expended, all initial water supply storage must be contracted for."

37. Plaintiffs, on June 21, 1974, by their then attorney and agent, E. H. Powers, advised officials of the Corps of Engineers and the Environmental Protection Agency of their intent to file a lawsuit seeking to enforce the provisions of Section 102 of Public Law 92-500.

38. During Fiscal Year 1973 the Corps of Engineers conducted a re-evaluation of the water supply benefits of the Hillsdale project. The re-evaluation consisted of the development of detailed costs for a particular single purpose alternative to the water supply component of the project. This re-evaluation of the water supply alternative was reported by the Corps of Engineers in the Cost Allo-

cation Design Memorandum dated October, 1973. Changes in the benefit/cost ratio to reflect this re-evaluation were provided to Congress the following spring, 1974.

39. In the spring of 1974 representatives of the Corps of Engineers reported to Congress on the status of the Hillsdale Project. In the Project Justification submitted to Congress by the Corps (Defendants' Appendix, pp. 612-615), the Corps reported that the Hillsdale Project was zero percent complete.

40. The justification concluded:

"Land acquisition and construction have been delayed pending a determination by the State of Kansas regarding its interest in sponsoring recreation development and State legislative action to authorize the State Park and Resources Authority to enter into an agreement for such development. The State (Kansas Water Resources Board) expects to execute a water supply contract in the third quarter of FY 1974."

41. In testimony before the Subcommittee on Public Works of the House Appropriations Committee, General Boerger reported that the benefit/cost ratio of the Project has declined from 1.6 to 1.0 the preceding year to 1.16 to 1.0 the current year because of the lack of a local sponsor for recreation benefits and as a result of the re-evaluation of the water supply alternative.

42. Benefits for recreation at the Hillsdale Project which had previously been considered a project purpose and had been included in the benefit/cost calculations were deleted for the first time in submissions to Congress in the spring of 1974 for Fiscal Year 1975 because there was no project manager.

43. Land acquisition for the Hillsdale Project was initiated by closing the purchase of tracts of land June 21, 1974.

44. The first land acquired for the Hillsdale Project by condemnation was taken on December 2, 1974.

45. Plaintiffs' Complaint was filed on October 22, 1974. For many years, proponents and opponents of the Project have appeared at Congressional Appropriation Committee hearings. Those opponents raised many of the same objections to the Project which are contained in the Complaint in this case. Congress has been kept fully informed for more than twenty years of the need for and purposes which the Project will serve. For much of this time, Congress has had the benefit of the views of the proponents and opponents of the Project. (Appendix, pages 386 thru 630.)

46. As of November 18, 1974, funds expended toward this Project have totaled approximately $3,330,000.00 Congress has had sufficients facts needed to make an informed decision and has made its collective judgments to appropriate funds toward continuing construction of this Project. (Appendix, pages 386 thru 630.)

47. On April 2, 1973, the United States District Court for the Western District of Virginia in *Cape Henry Bird Club* v. *Laird*, 359 F.Supp. 404, 421, resolved a controversy over the applicability of the 1972 FWPCA Amendments to the Corps of Engineers Gathright Dam Project. That Project had been authorized and funded for construction prior to the effective date of the amendments. The court decided that the amendments were not applicable to the Project because Congress did not make the amendments retroactive and "the amendments apply only to any report proposing authorization or construction." This ruling was sustained by the United States Court of Appeals for the Fourth Circuit, *Cape Henry Bird Club* v. *Laird*, 484 F.2d 453, 454.

48. Sometime in October 1973, following the Fourth Circuit decision on the Gathright Project, representatives of the Office of Management and Budget (OMB), the Corps of Engineers (Corps), and the Environmental Protection Agency (EPA) met in the OMB offices. Each of these agencies had their own legal counsel, program people and examiners present. The applicability of the 1972 FWPCA Amendments was considered at length. Those present took the position, and have continued thereafter to hold to the position, that the 1972 FWPCA Amendments were not applicable to the Project. The Administrative Action was made in good faith, and was an informed one.

49. On November 12, 1973, the Environmental Protection Agency circulated to Regional Administrators, an administrative decision that determinations regarding water quality control storage in authorized Projects will be limited to those Projects for which funds to initiate construction, including land acquisition, had not been appropriated prior to the passage of P.L. 92-500. As a result, the Environmental Protection Agency has not studied the need for and value of storage in the Hillsdale Lake, Kansas Project for the purpose of water quality control, the EPA Regional Administrator having determined that the 1972 FWPCA Amendments are not applicable to this Project.

50. The EPA decision referred to in finding numbered 49 was made after a full discussion and examination of the facts presented. The decision was an informed one and was made in good faith.

51. During the hearings of the subcommittee of the Senate Committee on Public Works for Fiscal Year 1975 appropriations, a Corp of Engineers representative was testifying and the following exchange took place:

> "Senator Stennis: Has the Corps of Engineers considered the terms of the Public Law 92-500 as it relates to water quality storage in Hillsdale Lake?

> "Colonel Rush: Public Law 92-500 is not applicable to the water quality storage in Hillsdale Lake because funds for initiation of construction were appropriated on August 25, 1972, which was prior to the effective date of Public Law 92-500, October 18, 1972." (P. Ex. 17.)

Thereafter, Congress appropriated $2,000,000.00 to continue construction of the Project with storage for water quality control as a Project purpose and without a study by the EPA of the need for and value of this Project purpose.

52. Congress has been kept fully informed regarding storage for water quality control in the Project and regarding the position of the agencies involved that the 1972 FWPCA Amendments are not applicable to this Project. (Appendix, pages 386 thru 630.)

53. Congress has had sufficient facts needed to make an informed decision and has made its collective judgments to appropriate funds toward continuing construction of the Project. (Appendix, pages 386 thru 630; P. Ex. 10, 11, 12.)

54. There are currently known approximately 53 or 54 archaeological sites within the land areas to be acquired for use in conjunction with the Hillsdale Reservoir Project.

Of the archaeological sites at Hillsdale about four have been excavated extensively and an additional four or so have been preliminarily tested; the remaining sites have merely been located and recorded.

The Hillsdale archaeological sites are broadly reflective of three major classifications:

(1) Early and late archaic; (2) Plains woodland; (3) Central plains phase.

In addition, there are indications, including a distinctive projectile point found in the area, that representatives of the Nebo Hill culture may be located in the Hillsdale area. This culture is named for the location in Missouri where it was first indicated and it represents one of the earliest known cultures thus far identified in the east central Great Plains.

55. Archaeological sites in the area which have been only located and recorded may be representative of cultures not yet identified in the area. If testing of the unexcavated sites is not conducted information concerning such unidentified cultures will be lost by project activities to the extent that such information exists in the area.

56. Construction of the Project will not interfere with the survey and recovery of archaeological resources of sufficient value to justify extended attempts of recovery within the Project area and this work can be completed before impoundment.

57. The number of archaeological sites known or potential was a matter not readily ascertainable in the light of then existing knowledge and in fact was not even clearly determined until August 1974. Plaintiffs' witness Dr. Arthur Rohn made it clear that whatever sites may exist in the Project area can be surveyed, excavated and the archaeological artifacts therein retrieved within the "reasonable" period of the "next 2-3 years." Impoundment of waters is not scheduled until 1979 which period is considerably beyond the "reasonable" time projected by plaintiffs' expert witness in which to carry out and conclude such matters.

58. The Hillsdale Reservoir Project will remove permanently from agricultural production 3,400 acres of crop land and 1,700 acres of pasture land as a result of inundation by the Reservoir. In addition, 1,600 acres in crop

land and 850 acres in pasture are now in agricultural production but will be acquired by the United States as project lands for use in conjunction with the Hillsdale Project. To an unspecified degree a portion of these project lands not flooded by the reservoir may be leased for agricultural production.

59. In terms of the availability of foodstuffs the removal of land from agricultural production in the Hillsdale area will not have a significant impact on prices paid for agricultural products nor on the quantity of such products produced in the country in view of efforts of producers to limit and curtail overproduction resulting in falling prices.

60. Currently in the Hillsdale area some recreational use occurs on an informal basis in much of the area. Such activities as hunting, fishing, horseback riding, hiking, and other forms of outdoor recreation are engaged in each year. There are several points where public roads cross Big and Little Bull Creeks providing access to the streams for swimming, fishing, boating and canoeing. Some of the landowners in the area who own land that provides prime habitat for game species allow hunting by permission on their property to the degree compatible with the carrying capacity of the habitat. There has been no substantial public recreation use of land in the area.

61. Much of the Hillsdale Reservoir area provides habitat for fish and wildlife resources. Many of the habitat units of the area are rated excellent by the United States and Wildlife Service. The densely vegetated areas provide habitat for a varied fauna including migratory waterfowls and song birds. Game species include bobwhite quail, cottontail rabbits, fox and grey squirrel, raccoon, coyote, mink, opossum, red fox, striped skunk, spotted skunk, and white-tailed deer.

62. The present stream fishery provides fishing opportunities for channel catfish, flathead catfish, crappie and various perches.

63. The existence of rare and endangered species in the Hillsdale Reservoir area is insignificant and will not be substantially affected by construction of the Hillsdale Reservoir project.

64. The Corps of Engineers has consulted extensively with the United States Fish and Wildlife Service with a view to the conservation of wildlife resources by preventing loss of and damage to such resources.

65. The Corps of Engineers claims benefits for the Hillsdale Project for recreational use in the amount of $240,000.00 per year based upon a visitation rate of 240,000 persons per year to be attained by the end of the third year of project operation.

66. The Corps of Engineers has not deducted from its recreation benefits an amount to compensate for the current recreational use of the Hillsdale area because no significant portion of it has ever been devoted to public use.

67. Archaeological information in the Hillsdale area is worth at least the cost of recovering such information. The Corps of Engineers has not attributed any amount to the Hillsdale Project as a cost for archaeological information irretrievably lost. The Corps of Engineers has not attributed to the Hillsdale Project an amount for the net cost of acquiring, operating and managing mitigation lands.

68. The fish and wildlife mitigation plan and planning of the Corps of Engineers was adequate when the final EIS was made. The fish and wildlife mitigation plan and planning of the Corps of Engineers for the Project, considered in the light of the prerogatives of Congress

in matters of land acquisition for such mitigation, is adequate under NEPA, and was sufficiently illuminated, developed and discussed in the final EIS.

69. At the present time, the Corps of Engineers is continuing its coordination with other agencies and individuals having expertise relative to fish and wildlife, archaeology and other aspects of the Project. Such ongoing consultation and coordination conforms to the mandate of NEPA, the Fish and Wildlife Coordination Act, 16 U.S.C. 661, 33 U.S.C. 540, Preservation of Historical and Archaeological Data, 16 U.S.C. 469, and is customary and adequate under the circumstances of this case.

70. There are no facts known to this Court that would establish that laches are a bar to this action.

71. All of the plaintiffs, by their agent, notified the federal defendants of their intent to sue under Public Law 92-500 within the required period of time prior to filing this action.

72. The Benefit-Cost Analysis and Ratio for the Project has been calculated in good faith and conforms to the statutes and laws of the United States, the directives of Congress and the regulations of the Corps of Engineers.

73. The plaintiffs are concerned with the Corps of Engineers' method of determining the benefit-cost ratio. The question involved in connection with the ultimate resolution of conflicting data in regard to the determination of benefit-cost ratios are solely a matter for Congressional determination.

74. The method of calculating the benefit-cost ratio for this Project has been brought to the attention of Congress many times over the past years. (Appendix, pages 286-630.) During Congressional committee hearings on appropriations for Fiscal Year 1975, while a representative

of the Corps of Engineers was testifying the following exchange took place:

> "Senator Stennis: Is the discount rate used in the economic analysis consistent with the Water Resources Development Act of 1974?
>
> Colonel Rush: Yes, sir. The 3 1/4-percent discount rate for the Project is in accordance with the requirements of section 80 of the Water Resources Development Act of 1974." (P.Ex. 17.)

Thereafter, Congress appropriated $2,000,000.00 to continue construction of the Project. However, plaintiffs and others are free to bring such matters to the attention of the legislative branch at any time any new appropriation for this Project is proposed. The plaintiffs have failed in their burden to show that the administrative actions of the Corps of Engineers with respect to the calculation of the Project benefit-cost ratio, both as set forth in the final EIS and subsequent to that time, were inadequate or "arbitrary and capricious."

75. Both the Corps of Engineers and the opponents of the Project have testified before Congressional Committees, for each of the last several years, regarding the benefit-cost ratio and Congress has continued to appropriate funds for construction. (Appendix, pages 386-630.) Congress has been fully informed regarding matters of Project economics and has had sufficient facts needed to make an informed decision. Congress has made its collective judgments to appropriate funds toward continuing construction of the Project. (P.Ex. 10, 11, 12; Appendix.)

76. Storage for water supply is one of the Project purposes. In order to be assured of a reliable source of water supply, the state of Kansas committed itself, by way of contract, approved by the Secretary of the Army on April 9, 1974, to repay to the Government the

allocated costs for 53,000 acre-feet of the Project water supply storage. (Court's Ex. 4.) The Kansas Water Resources Board has applications from cities for more water than is available and the Board expects the 53,000 acre-feet of water supply storage in the Project to be consumed within a very few years after it becomes available. (D.Ex. N, p. 7.)

77. In 1961 and 1966, the Corps of Engineers restudied the Project economics. (Court's Ex. 4, Federal Defendants' Affirmative Response Appendix, referred to as Appendix, page 90.) Subsequently, Project storages were reallocated to reflect current needs as follows:

Flood control:	81,000 acre-feet
Multipurpose:	68,000 acre-feet
(Water Supply)	(53,000 acre-feet)
(Water Quality)	(15,000 acre-feet)
Sediment	11,000 acre-feet
TOTAL	160,000 acre-feet

These project storage allocations were reported to Congress by the Corps of Engineers during Fiscal Year 1972 appropriation hearings. (Appendix, pages 527, 546.)

78. During Fiscal Year 1968, Congressional Hearings on appropriations, the Corps of Engineers reported to Congress the benefits of the various Project purposes including storage for water supply. (Appendix, page 238G.) For that fiscal year, Congress appropriated funds to initiate pre-construction planning. During Fiscal Year 1972 Congressional Hearings on appropriations, the Corps of Engineers reported to Congress on the various Project storage allocations, including 53,000 acre-feet for water supply. (Appendix, pages 527, 546.) Thereafter, for Fiscal Year 1973, Congress appropriated funds to initiate construction of the Project.

79. The Corps of Engineers gave full, good faith consideration to alternatives for Project water supply storage and such consideration was reasonable and adequate under the circumstances of this case. (Court's Exhibit 1; Appendix.) Congress has been fully informed regarding the matter of Project storage for water supply purposes and has had sufficient facts needed to make an informed decision. Congress has made its collective judgments to appropriate funds toward continuing construction of the Project.

80. Each Finding of Fact set forth in the foregoing Findings of Fact deemed to be a Conclusion of Law is hereby found to be a Conclusion.

From the foregoing rulings and Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. Jurisdiction exists under 28 U.S.C. 1331(a), 28 U.S.C. 1361 and 5 U.S.C. 701-706.

2. All of the plaintiffs in this action have standing to sue.

3. None of the plaintiffs are barred by laches from maintaining this action.

4. All of the plaintiffs have satisfied the requirements of Public Law 92-500 as a prerequisite for maintaining a cause of action under that statute.

5. The plaintiffs have sufficient interest for themselves and for those similarly situated and have the right to make claims typical of those representative of the class so that this action may proceed on a class basis. The representation of the class in this case is adequate to determine the issues involved and further notice is not necessary to protect the interests of any other person who might be affected by the rulings or judgment in this case.

6. Authorization and appropriations toward continuing construction of the Project are legislative functions which will not be disturbed by the judiciary.

7. Although inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one, and the reviewing Court is not empowered to substitute its judgment for that of the Agency.

8. The decision of the Corps of Engineers to proceed with the Hillsdale Lake Project was within the scope of its authority, not an abuse of its authority, and was not arbitrary or capricious, or otherwise contrary to law.

9. The Corps of Engineers and the Environmental Protection Agency seriously considered the applicability of the 1972 Amendments to the Federal Water Pollution Control Act to Projects which have been authorized and funded for construction, including land acquisition, prior to the effective date of the Amendments. The determination that they do not apply was objective, reasonable and made in good faith.

10. The decision of the Environmental Protection Agency and the Corps of Engineers, that the provisions of the 1972 Amendments to the Federal Water Pollution Control Act are not applicable to the Hillsdale Lake Project, as they relate to storage for water quality control, was within the scope of their authority, not an abuse of their authority, and was not arbitrary or capricious or otherwise contrary to law. The 1972 Amendments to the Federal Water Pollution Control Act are not applicable to the Hillsdale Lake Project.

11. Whether to approve water quality control storage as a Project purpose and appropriate funds for construction of the Project with such purpose included, is a prerogative of Congress, and is not a judicial prerogative.

12. The draft Environmental Impact Statement is in essence an administratively created device for facilitating consultation with appropriate agencies.

13. The Corps of Engineers acted in good faith, (1) in consulting with appropriate agencies, (2) in the preparation and circulation of the draft Environmental Impact Statement, and (3) in the preparation of the Final Environmental Impact Statement.

14. The Final Environmental Impact Statement as prepared and filed with the Council on Environmental Quality meets the requirements of the National Environmental Policy Act. The Provisions of 42 U.S.C. 4332(2)(c) with regard to the preparation of the Final Environmental Impact Statement have been observed to the extent required by the statute and its application is interpreted and applied by the responsible administrators of the Council on Environmental Quality.

15. Judicial review of an environmental impact statement is limited to a determination of whether the statement is an objective good-faith effort to comply with NEPA and a reasonable presentation of the subject area mandated by NEPA. The Court will not second-guess the scientists, experts, economists, and planners who make the environmental statement.

16. The National Environmental Policy Act only requires, as concerns cost-benefit ratio, that presently unquantified environmental amenities and value be given appropriate consideration in decision making along with economic and technical considerations, and did not require the Corps of Engineers to fix a dollar figure to either environmental losses or benefits of this Project. Cost-benefit matters are adequately covered in the Final Environmental Statement.

17. The 1972 Final Environmental Impact Statement for the Hillsdale Project is a good-faith, objective and reasonable presentation of the subject areas mandated by NEPA.

18. The methods used by the Corps of Engineers in computing cost-benefit ratios, and the administrative actions of the Corps in cost-benefit matters, as they pertain to the Hillsdale Project, were made and determined in good faith, and were not shown to be arbitrary or capricious or otherwise contrary to law; and it is not within the prerogative of this Court to pick and choose between conflicting views and opinions of differing experts on such matters.

19. Inclusion of storage for water supply as a Project purpose is a matter calling for the administrative judgment of those having special expertise on the subject; and is judicially reviewable only to the extent an agency acted outside its scope of authority, abused its authority, or acted arbitrarily, capricious or otherwise contrary to law. The Corps of Engineers decision to include storage for water supply as a Project purpose was a good-faith, objective and reasonable determination within the scope of its authority, not an abuse of its authority, was not arbitrary or capricious, or otherwise contrary to law. Whether to approve water supply storage as a Project purpose and appropriate funds for construction of the Project with such purpose included, is a prerogative of Congress, and not within the prerogative of this Court.

20. Whether further studies need be made is not a matter for decision by this Court. NEPA creates no substantive rights in citizens to safe, healthful, productive and culturally pleasing surroundings. Instead, the responsible agency is required to take these factors into account at some point before commencement of the Project. Com-

pletion of an impact statement should not be unreasonably or interminably delayed in order to include all potential comments or the results of works in progress which might shed some additional light on the subject of the impact statement. Such a result would often inordinately delay or prevent any decision in environmental cases. The Court looks for adequacy and completeness in an impact statement, not perfection. There must come a time, after the passage of years, when a needed public improvement, such as this one, ought to be built.

21. The Court finds generally in favor of the defendants and against the plaintiffs. Plaintiffs have failed to sustain the burden of proof required to support their numerous objections and complaints to the Hillsdale Dam and Reservoir Project.

22. Each Conclusion of Law set forth in the foregoing Conclusions of Law deemed to be a Finding of Fact is hereby found to be a Finding of Fact.

Upon the foregoing Findings of Fact, Rulings and Conclusions of Law, the plaintiffs' requests for injunction, both temporary and permanent, must be denied, and the Complaint of the plaintiffs should be dismissed.

Counsel for defendants will prepare, circulate and submit to the Court for entry, an appropriate form of judgment consistent with these Findings and Conclusioms.

Dated at Topeka, Kansas, this 8th day of April, 1975.

/s/ George Templar
Senior Judge, Assigned

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 74-209-C5

SAVE OUR INVALUABLE LAND, INC., et al.,
Plaintiffs,

v.

COLONEL WILLIAM R. NEEDHAM,
District Engineer, et al.,
Defendants,

and

CITY OF OLATHE, KANSAS, et al.,
Defendants-Intervenor.

AMENDED FINAL JUDGMENT AND DECREE

(Filed September 12, 1975)

Upon this Court's consideration of the pleadings, final Environmental Impact Statement, the Stipulations of the parties, the evidence introduced upon hearing, the briefs and suggested findings of fact and conclusions of law of the parties and their arguments, and upon the written Findings of Fact and Conclusions of Law entered by the Court on April 8, 1975, the Court doth finally ORDER, ADJUDGE AND DECREE that:

1. The applications and requests of plaintiffs for injunction, both temporary and permanent, and other relief, should be and the same are hereby denied.

2. The cause of action of plaintiffs herein should be, and the same hereby is, dismissed with prejudice.

3. The Corps of Engineers may proceed forthwith with the construction of the Hillsdale Lake Project as planned.

4. The parties are to bear their own costs.

Dated at Topeka, Kansas this 8th day of September, 1975.

/s/ George Templar
Senior Judge, Assigned

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 75-1511

SAVE OUR INVALUABLE LAND (SOIL), INC., et al.,
Appellants,
v.
COLONEL WILLIAM R. NEEDHAM, et al.,
Appellees,
and
CITY OF OLATHE, KANSAS, et al.,
Intervenor-Appellees.

Appeal from the United States District Court for the District of Kansas
(D.C. No. 74-209-C5)

(Filed September 29, 1976)

Arthur A. Benson II, Attorney for Appellants.

Eva R. Datz, Department of Justice (Peter R. Taft, Assistant Attorney General, E. Edward Johnson, United States Attorney, Roger K. Weatherby, Assistant United States Attorney, and Jacques B. Gelin, Department of Justice, on the brief), for Federal Appellees.

F. Philip Kirwan (Lyman Field, Joseph H. McDowell; Of Counsel: Margolin and Kirwan; Rogers, Field, Gentry, Benjamin and Robertson, on the brief) for Intervenor-Appellees.

Before McWILLIAMS, BARRETT, and DOYLE, Circuit Judges.

McWILLIAMS, Circuit Judge.

This is a suit to enjoin the Corps of Engineers from constructing the Hillsdale Dam on the Big Bull Creek in Miami County, Kansas. The action was instituted by Save Our Invaluable Land (SOIL), Inc., a non-profit organization organized under the laws of Kansas, whose members are, in the main, landowners who reside in the area of the proposed dam site. The gist of the complaint is that the Corps of Engineers has not complied with the requirements of the Federal Water Pollution Control Act, the National Environmental Policy Act, and the Water Supply Act. Named as parties defendant, in addition to the Corps of Engineers, were various administrative officers of the Environmental Protection Agency. By answer the federal defendants alleged compliance with the several acts of Congress with which we are here concerned, and attached to the answer a copy of the final Environmental Impact Statement (EIS) prepared by the Corps of Engineers in November 1971, and filed with the Council on Environmental Quality on February 2, 1972.

Trial of this matter was to the court, sitting without a jury, and after a four-day trial the judge found in favor of the defendants and dismissed the action. The trial court made elaborate findings and conclusions, consisting of some 43 pages. SOIL now appeals. We affirm.

On appeal SOIL raises essentially three points: (1) the trial court erred in finding that Section 102(b)(3) of the 1972 Amendments to the Federal Water Pollution Control Act did not apply to the Hillsdale Dam; (2) the trial court erred in concluding that the Corps's EIS met the requirements of the National Environmental Policy Act of 1969, and that the Corps otherwise met the requirements of the Fish and Wildlife Coordination Act of 1958; and (3) the trial court erred in concluding that the inclusion of storage for water supply as a project purpose met

the requirements of the Water Supply Act of 1958, as amended. We shall discuss these several matters seriatim.

I. 1972 Amendments to the Federal Water Pollution Control Act

SOIL initially argues that the trial court erred in holding that Section 102(b)(3) of the 1972 Amendments to the Federal Water Pollution Control Act did not apply to the Hillsdale Dam. That section, which appears as 33 U.S.C. § 1252(b)(3), reads as follows:

> (3) The need for, the value of, and the impact of, storage for water quality control shall be determined by the Administrator, and his views on these matters shall be set forth in any report or presentation to Congress proposing authorization or construction of any reservoir including such storage.

The above quoted statute needs to be set in a bit of historical context. Prior to the 1972 amendments, storage of water for the purpose of controlling the quality of a stream was one method, though not the only one, authorized by Congress in its attack on the problem of water pollution. Under this particular approach water was stored to be released when the natural flow in a stream was low, thereby augmenting the stream flow and diluting the pollution entering the stream below the storage facility. This low flow augmentation did nothing to eliminate pollution, as such, but was only designed to keep pollution at acceptable levels.

In 1972 Congress shifted the emphasis to an elimination of the so-called point sources of pollution. Illustrative of this changed approach to the water pollution problem is 33 U.S.C. § 1252(b)(1), which reads as follows:

> (b)(1) In the survey or planning of any reservoir by the Corps of Engineers, Bureau of Reclamation, or other Federal agency, consideration shall be given to inclusion of storage for regulation of streamflow, except that any such storage and water releases shall not be provided as a substitute for adequate treatment or other methods of controlling waste at the source.

The Hillsdale Dam was authorized by Congress in 1954 as one segment of a nine-part reservoir system in the Osage-Marias des Cygnes River Basin in Kansas. In 1961, and again in 1966, the project was deferred for further study. The restudy was finally completed and the project entered the advanced engineering and design phase with Congress appropriating funds for such planning for fiscal years 1968 through 1972. On August 25, 1972, Congress appropriated funds to initiate construction of the dam. The 1972 Amendments to the Federal Water Pollution Control Act became law on October 18, 1972. It was in this setting that the trial court held that 33 U.S.C. § 1252(b)(3) did not apply to the Hillsdale Dam. Under the circumstances, we agree.

In the instant case one of the purposes of the Hillsdale Dam was admittedly water quality control. Other purposes were flood control, water supply, recreation, and fish and wildlife. And each of these purposes, as well as other matters, was taken into consideration in arriving at a final cost/benefit ratio. It is SOIL'S position that the Corps of Engineers failed to comply with 33 U.S.C. § 1252(b)(3) in that the EPA Administrator did not determine the need for, the value of, and the impact of storage for water control, nor were his views on these matters set forth in "any report or presentation to Congress proposing authorization or construction of any reservoir including such storage," as mentioned in the statute. As indicated, both the Corps, as well as the EPA, are of the view that § 1252

(b)(3) does not apply to the Hillsdale Dam inasmuch as the authorization for the dam and its construction had cleared Congress before the enactment of § 1252 (b)(3).

As above indicated, we are of the view that § 1252(b)(3) does not apply to the Hillsdale Dam. In support thereof, *see*, for example, Cape Henry Bird Club v. Laird, 359 F.Supp. 404 (W.D.Va. 1973), aff'd on appeal, 484 F.2d 453 (4th Cir. 1973). In its affirmance the Fourth Circuit held that neither § 1252(b)(1) nor (3) applied to the dam there under consideration, because "[t]he dam is neither in the survey or planning stage, nor is it before Congress for authorization or construction. Those stages have long passed." The foregoing applies to the instant case with equal vigor, even though actual construction of the Hillsdale Dam was delayed by temporary impoundment of budgeted funds. The issue is not whether the Corps because of such delay *could* have complied with § 1252(b)(3), if it chose to do so. Rather the issue is whether under the circumstances, the Corps, and the EPA, were required to comply with § 1252(b)(3). We think they were not.

In further support of our holding, *see also* Environmental Defense Fund v. Tennessee Valley Authority, 371 F.Supp. 1004 (E.D.Tenn. 1973), aff'd 492 F.2d 466 (6th Cir. 1974). To the same effect, *see* Sierra Club v. Froehlke, 392 F.Supp. 130 (E.D. Mo. 1975), where that court flatly declared that "the plain language of the statute [33 U.S.C. § 1252(b)(3) and (3)] indicates that it is applicable only to projects which are in the planning or pre-authorization stages."

We do not regard State of Ohio ex rel. Brown v. Callaway, 497 F.2d 1235 (6th Cir. 1974) to be apposite to the present problem. There the problem was primarily one of intervention. In any event, we believe that the result reached by the Fourth Circuit in *Cape Henry Bird*

Club is the proper one and more properly fits the particular facts of our case.

As indicated, the interpretation we have given § 1252 (b)(3) concerning its applicability to Hillsdale Dam is the interpretation which has heretofore been adopted by both EPA and the Corps. The interpretation given a statute by the administrative agency charged with its administration is entitled to weight. Such fact fortifies us in our conclusion that the interpretation which we give § 1252(b)(3) is " 'correct,' to the extent that any particular interpretation of a complex statute such as this is the 'correct' one." Train v. Natural Resources Defense Council, 421 U.S. 60 (1975).

II. Sufficiency of the Environmental Impact Statement (EIS)

SOIL contends that the Corps has not complied with 42 U.S.C. § 4332(A)(B) and (C). Sections (A) and (B) are, in a sense, declarations of policy, and to effectuate such policies, Section (C) requires that an environmental impact statement be filed on all major federal actions, and lists five specific matters to be covered in such statement. Section (C) is apparently designed to make certain that there be compliance with the statement of policy announced in Sections (A) and (B). In the instant case the Corps filed a 57-page EIS, which included some 32 pages of comments by other governmental agencies, both state and federal, together with the Corps's response to each comment. Such was not enough, asserts SOIL. We disagree.

Judicial review of an EIS is limited to a consideration of the following: (1) does the EIS discuss all of the five procedural requirements listed in 42 U.S.C. § 4332(C); (2) does the EIS constitute a good faith compliance with the demands of NEPA; and (3) does the statement contain

a reasonable discussion of the subject matter involved in the five respective areas? Sierra Club v. Stamm, 507 F.2d 788 (10th Cir. 1974) and National Helium Corporation v. Morton, 486 F.2d 995 (10th Cir. 1973), *cert. denied*, 416 U.S. 993 (1973). Thus, in a real sense, an EIS is to be tested by the concepts of "good faith" and a "reasonable" discussion of the five mandated areas of subject matter. Perfection is not the test. Environmental Defense Fund v. Corps of Engineers of the United States Army, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 411 U.S. 908 (1972). Nor should the courts in evaluating an EIS engage in hindsight judgment by way of second guessing.

Judged by the foregoing standard, our study of the EIS filed by the Corps in the instant case convinces us, as it did the trial court, that there was compliance with 42 U.S.C. § 4332(A)(B) and (C). In sum, the Corps did consider the impact on the environment of the construction of the Hillsdale Dam, possible alternatives, and ways of easing the impact on the environment from the building of the dam. In preparing its EIS the Corps did not ignore the Fish and Wildlife Coordination Act of 1958, 16 U.S.C. §§ 661, *et seq.* Also, the cost/benefit ratio was in our view adequately covered, when the EIS is considered in its entirety. Sierra Club v. Stamm, 507 F.2d 788 (10th Cir. 1974). We think the EIS was sufficient.

III. Water Supply Act of 1958

SOIL'S final contention is that the Corps has failed to comply with the Water Supply Act of 1958, as amended. 43 U.S.C. §§ 390, *et seq.* Section 390b declares it to be the policy of the Congress to recognize that the primary responsibility for developing water supplies for local domestic use rests on "the several states and local interests." In furtherance of this policy § 390b(b) provides that prior to the construction of any federal project which includes

water supply provisions for *present* demands, "State or local interests shall agree to pay for the cost of such provisions." As regarding *future* water demands, that same section further provides that a certain per cent of the "total estimated cost of any project may be allocated to anticipated future demands when the State or local interests give reasonable assurance, and there is reasonable evidence, that such demands for the use of such storage will be made within a period of time which will permit paying out the costs allocated to water supply within the life of the project."

As mentioned at the outset, one of the purposes of the Hillsdale Dam is to store water for domestic use by the surrounding communities. It is agreed by the parties that, insofar as *present* demand is concerned, there is an existing contract between the United States and the State of Kansas acting through the Kansas Water Resource Board which requires state and local interests to pay for the cost of storage to meet such present demand.

The dispute here is over whether the State and local interests have given the Corps reasonable assurances as to anticipated future demand, and whether there is reasonable evidence on the basis of which the Corps could conclude that demands will be made within a period of time which will permit paying out the allocated costs within the life of the project. This particular matter was fully explored at the trial of this matter, and the trial court concluded, in effect, if not in so many words, that the Corps did have "reasonable assurances," and that there was "reasonable evidence" that there would be such future demand. *SOIL* suggests that this finding is not supported by the record and is indeed clearly erroneous. We do not agree.

As indicated, it is agreed that State and local interests have contractually agreed to pay for the project insofar

as *present* demand is concerned. We think the record indicates that the Corps was also given "reasonable assurances" by these same State and local interests that there will be a future demand for water which will permit paying out the allocated costs within the life of the project, and that there was "reasonable evidence" to indicate that there would be such demand. In this regard we refer to the letter from the Kansas Water Resource Board, dated August 2, 1973, wherein the Board advised the Corps that it would have need for the project's anticipated water supply. That letter itself sets forth data which establishes the factual basis for the prediction. Moreover, a contract was later entered into between the state and local interests and the United States concerning both present and future water supply, and the payment thereof. All things considered, then, the record shows compliance with the Water Supply Act of 1958.

Judgment affirmed.

STATUTES

16 U.S.C. § 661

§ 661. Declaration of purpose; cooperation of agencies; surveys and investigations; donations

For the purpose of recognizing the vital contributions of our wildlife resources to the Nation, the increasing public interest and significance thereof due to expansion of our national economy and other factors, and to provide that wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs through the effectual and harmonious planning, development, maintenance, and coordination of wildlife conservation and rehabilitation for

the purposes of sections 661 to 666c of this title in the United States, its Territories and possessions, the Secretary of the Interior is authorized (1) to provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat, in controlling losses of the same from disease or other causes, in minimizing damages from overabundant species, in providing public shooting and fishing areas, including easements across public lands for access thereto, and in carrying out other measures necessary to effectuate the purposes of said sections; (2) to make surveys and investigations of the wildlife of the public domain, including lands and waters or interests therein acquired or controlled by any agency of the United States; and (3) to accept donations of land and contributions of funds in furtherance of the purposes of said sections.

16 U.S.C. § 662

§ 662. Impounding, diverting, or controlling of waters—Consultations between agencies

(a) Except as hereafter stated in subsection (h) of this section, whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the con-

servation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development.

Reports and recommendations; consideration

(b) In furtherance of such purposes, the reports and recommendations of the Secretary of the Interior on the wildlife aspects of such projects, and any report of the head of the State agency exercising administration over the wildlife resources of the State, based on surveys and investigations conducted by the United States Fish and Wildlife Service and such State agency for the purpose of determining the possible damage to wildlife resources and for the purpose of determining means and measures that should be adopted to prevent the loss of or damage to such wildlife resources, as well as to provide concurrently for the development and improvement of such resources, shall be made an integral part of any report prepared or submitted by any agency of the Federal Government responsible for engineering surveys and construction of such projects when such reports are presented to the Congress or to any agency or person having the authority or the power, by administrative action or otherwise, (1) to authorize the construction of water-resource development projects or (2) to approve a report on the modification or supplementation of plans for previously authorized projects, to which section 661 to 666c of this title apply. Recommendations of the Secretary of the Interior shall be as specific as is practicable with respect to features recommended for wildlife conservation and development, lands to be utilized or acquired for such purposes, the results expected, and shall describe the damage to wildlife attributable to the project and the measures proposed for mitigating or compensating for these damages. The reporting

officers in project reports of the Federal agencies shall give full consideration to the report and recommendations of the Secretary of the Interior and to any report of the State agency on the wildlife aspects of such projects, and the project plan shall include such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum overall project benefits.

Modification of projects; acquisition of lands

(c) Federal agencies authorized to construct or operate water-control projects are authorized to modify or add to the structures and operations of such projects, the construction of which has not been substantially completed on the date of enactment of the Fish and Wildlife Coordination Act, and to acquire lands in accordance with section 663 of this title, in order to accommodate the means and measures for such conservation of wildlife resources as an integral part of such projects: *Provided,* That for projects authorized by a specific Act of Congress before the date of enactment of the Fish and Wildlife Coordination Act (1) such modification or land acquisition shall be compatible with the purposes for which the project was authorized; (2) the cost of such modifications or land acquisition, as means and measures to prevent loss of and damage to wildlife resources to the extent justifiable, shall be an integral part of the cost of such projects; and (3) the cost of such modifications or land acquisition for the development or improvement of wildlife resources may be included to the extent justifiable, and an appropriate share of the cost of any project may be allocated for this purpose with a finding as to the part of such allocated cost, if any, to be reimbursed by non-Federal interests.

Project costs

(d) The cost of planning for and the construction or installation and maintenance of such means and measures adopted to carry out the conservation purposes off this section shall constitute an integral part of the cost of such projects: *Provided,* That such cost attributable to the development and improvement of wildlife shall not extend beyond that necessary for (1) land acquisition, (2) facilities as specifically recommended in water resource project reports, (3) modification of the project, and (4) modification of project operations, but shall not include the operation of wildlife facilities.

Transfer of funds

(e) In the case of construction by a Federal agency, that agency is authorized to transfer to the United States Fish and Wildlife Service, out of appropriations or other funds made available for investigations, engineering, or construction, such funds as may be necessary to conduct all or part of the investigations required to carry out the purposes of this section.

Estimation of wildlife benefits or losses

(f) In addition to other requirements, there shall be included in any report submitted to Congress supporting a recommendation for authorization of any new project for the control or use of water as described herein (including any new division of such project or new supplemental works on such project) and estimation of the wildlife benefits or losses to be derived therefrom including benefits to be derived from measures recommended specifically for the development and improvement of wildlife resources, the cost of providing wildlife benefits (including the cost of additional facilities to be installed or lands to be acquired specifically for that particular phase of wildlife conserva-

tion relating to the development and improvement of wildlife), the part of the cost of joint-use facilities allocated to wildlife, and the part of such costs if any, to be reimbursed by non-Federal interests.

Applicability to projects

(g) The provisions of this section shall be applicable with respect to any project for the control or use of water as prescribed herein, or any unit of such project authorized before or after the date of enactment of the Fish and Wildlife Coordination Act for planning or construction, but shall not be applicable to any project or unit thereof authorized before the date of enactment of the Fish and Wildlife Coordination Act if the construction of the particular project or unit thereof has been substantially completed. A project or unit thereof shall be considered to be substantially completed when sixty percent or more of the estimated construction cost has been obligated for expenditure.

Exempt projects and activities

(h) The provisions of sections 661 to 666c of this title shall not be applicable to those projects for the impoundment of water where the maximum surface area of such impoundments is less than ten acres, nor to activities for or in connection with programs primarily for land management and use carried out by Federal agencies with respect to Federal lands under their jurisdiction.

16 U.S.C. § 663

§ 663. Same—Conservation, maintenance, and management of wildlife resources; development and improvement

(a) Subject to the exceptions prescribed in section 662(h) of this title, whenever the waters of any stream or other body of water are impounded, diverted, the channel

deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, adequate provision, consistent with the primary purposes of such impoundment, diversion, or other control, shall be made for the use thereof, together with any areas of land, water, or interests therein, acquired or administered by a Federal agency in connection therewith, for the conservation, maintenance, and management of wildlife resources thereof, and its habitat thereon, including the development and improvement of such wildlife resources pursuant to the provisions of section 662 of this title.

Use and availability of waters, land, or interests therein

(b) The use of such waters, land, or interests therein for wildlife conservation purposes shall be in accordance with general plans approved jointly (1) by the head of the particular department or agency exercising primary administration in each instance, (2) by the Secretary of the Interior, and (3) by the head of the agency exercising the administration of the wildlife resources of the particular State wherein the waters and areas lie. Such waters and other interests shall be made available, without cost for administration, by such State agency, if the management of the properties relate to the conservation of wildlife other than migratory birds, or by the Secretary of the Interior, for administration in such manner as he may deem advisable, where the particular properties have value in carrying out the national migratory bird management program: *Provided*, That nothing in this section shall be construed as affecting the authority of the Secretary of Agriculture to cooperate with the States or in making lands available to the States with respect to the management of wildlife and wildlife habitat on lands administered by him.

Acquisition of land, waters, and interests therein; report to Congress

(c) When consistent with the purposes of sections 661 to 666c of this title and the reports and findings of the Secretary of the Interior prepared in accordance with sections 662 of this title, land, waters, and interests therein may be acquired by Federal construction agencies for the wildlife conservation and development purpose of sections 661 to 666c of this title in connection with a project as reasonably needed to preserve and assure for the public benefit the wildlife potentials of the particular project area: *Provided*, That before properties are acquired for this purpose, the probable extent of such acquisition shall be set forth, along with other data necessary for project authorization, in a report submitted to the Congress, or in the case of a project previously authorized, no such properties shall be acquired unless specifically authorized by Congress, if specific authority for such acquisition is recommended by the construction agency.

Use of acquired properties

(d) Properties acquired for the purposes of this section shall continue to be used for such purposes, and shall not become the subject of exchange or other transactions if such exchange or other transaction would defeat the initial purpose of their acquisition.

Availability of Federal lands acquired or withdrawn for Federal water-resource purposes

(e) Federal lands acquired or withdrawn for Federal water-resource purposes and made available to the States or to the Secretary of the Interior for wildlife management purposes, shall be made available for such purposes in accordance with sections 661 to 666c of this title, notwithstanding other provisions of law.

National forest lands

(f) Any lands acquired pursuant to this section by any Federal agency within the exterior boundaries of a national forest shall, upon acquisition, be added to and become national forest lands, and shall be administered as a part of the forest within which they are situated, subject to all laws applicable to lands acquired under the provisions of the Act of March 1, 1911 (36 Stat. 961), unless such lands are acquired to carry out the National Migratory Bird Management Program.

Mar. 10, 1934, c. 55, § 3, 48 Stat. 401; 1940 Reorg.Plan No. III, § 3, eff. June 30, 1940, 5 F.R. 2108, 54 Stat. 1232; Aug. 14, 1946, c. 965, 60 Stat. 1080; Aug. 12, 1958, Pub.L. 85-624, § 2, 72 Stat. 566.

33 U.S.C. § 1251

§ 1251. Congressional declaration of goals and policy

(a) The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.

(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

33 U.S.C. § 1252

§ 1252. Comprehensive programs for water pollution control

(a) The Administrator shall, after careful investigation, and in cooperation with other Federal agencies, State water pollution control agencies, interstate agencies, and the municipalities and industries involved, prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters. In the development of such comprehensive programs due regard shall be given to the improvements which are necessary to conserve such waters for the protection and propagation of fish and

aquatic life and wildlife, recreational purposes, and the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes. For the purpose of this section, the Administrator is authorized to make joint investigations with any such agencies of the condition of any waters in any State or States, and of the discharges of any sewage, industrial wastes, or substance which may adversely affect such waters.

(b) (1) In the survey or planning of any reservoir by the Corps of Engineers, Bureau of Reclamation, or other Federal agency, consideration shall be given to inclusion of storage for regulation of streamflow, except that any such storage and water releases shall not be provided as a substitute for adequate treatment or other methods of controlling waste at the source.

(2) The need for and the value of storage for regulation of streamflow (other than for water quality) including but not limited to navigation, salt water intrusion, recreation, esthetics, and fish and wildlife, shall be determined by the Corps of Engineers, Bureau of Reclamation, or other Federal agencies.

(3) The need for, the value of, and the impact of, storage for water quality control shall be determined by the Administrator, and his views on these matters shall be set forth in any report or presentation to Congress proposing authorization or construction of any reservoir including such storage.

(4) The value of such storage shall be taken into account in determining the economic value of the entire project of which it is a part, and costs shall be allocated to the purpose of regulation of streamflow in a manner which will insure that all project purposes, share equitably in the benefits of multiple-purpose construction.

(5) Costs of regulation of streamflow features incorporated in any Federal reservoir or other impoundment under the provisions of this chapter shall be determined and the beneficiaries identified and if the benefits are widespread or national in scope, the costs of such features shall be nonreimbursable.

(6) No license granted by the Federal Power Commission for a hydroelectric power project shall include storage for regulation of streamflow for the purpose of water quality control unless the Administrator shall recommend its inclusion and such reservoir storage capacity shall not exceed such proportion of the total storage required for the water quality control plan as the drainage area of such reservoir bears to the drainage area of the river basin or basins involved in such water quality control plan.

(c) (1) The Administrator shall, at the request of the Governor of a State, or a majority of the Governors when more than one State is involved, make a grant to pay not to exceed 50 per centum of the administrative expenses of a planning agency for a period not to exceed three years, which period shall begin after October 18, 1972, if such agency provides for adequate representation of appropriate State, interstate, local, or (when appropriate) international interests in the basin or portion thereof involved and is capable of developing an effective, comprehensive water quality control plan for a basin or portion thereof.

(2) Each planning agency receiving a grant under this subsection shall develop a comprehensive pollution control plan for the basin or portion thereof which—

(A) is consistent with any applicable water quality standards, effluent and other limitations, and thermal discharge regulations established pursuant to current law within the basin;

(B) recommends such treatment works as will provide the most effective and economical means of collection, storage, treatment, and elimination of pollutants and recommends means to encourage both municipal and industrial use of such works;

(C) recommends maintenance and improvement of water quality within the basin or portion thereof and recommends methods of adequately financing those facilities as may be necessary to implement the plan; and

(D) as appropriate, is developed in cooperation with, and is consistent with any comprehensive plan prepared by the Water Resources Council, any area-wide waste management plans developed pursuant to section 1288 of this title, and any State plan developed pursuant to section 1313(e) of this title.

(3) For the purposes of this subsection the term "basin" includes, but is not limited to, rivers and their tributaries, streams, coastal waters, sounds, estuaries, bays, lakes, and portions thereof, as well as the lands drained thereby.

33 U.S.C. § 1252a

§ 1252a. Reservoir projects, water storage; modification: storage for other than for water quality, opinion of Federal agency, committee resolutions of approval; provisions inapplicable to projects with certain prescribed water quality benefits in relation to total project benefits

In the case of any reservoir project authorized for construction by the Corps of Engineers, Bureau of Reclamation, or other Federal agency when the Administrator of the Environmental Protection Agency determines pursuant to section 1252(b) of this title that any storage in such

project for regulation of streamflow for water quality is not needed, or is needed in a different amount, such project may be modified accordingly by the head of the appropriate agency, and any storage no longer required for water quality may be utilized for other authorized purposes of the project when in the opinion of the head of such agency, such use is justified. Any such modification of a project where the benefits attributable to water quality are 15 per centum or more but not greater than 25 per centum of the total project benefits shall take effect only upon the adoption of resolutions approving such modification by the appropriate committees of the Senate and House of Representatives. The provisions of the section shall not apply to any project where the benefits attributable to water quality exceed 25 per centum of the total project benefits.

Pub.L. 93-251, Title I, § 65, Mar. 7, 1974, 88 Stat. 30.

Codification. Section was enacted as a part of Water Resources Development Act of 1974, and not as a part of Federal Water Pollution Control Act, which comprises this chapter.

42 U.S.C. § 4321

§ 4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 U.S.C. § 4331

§ 4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

42 U.S.C. § 4332

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by subchapter II of this chapter.

43 U.S.C. § 390b

§ 390b. Development of water supplies for domestic, municipal, industrial, and other purposes—Declaration of policy

(a) It is declared to be the policy of the Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects.

Storage in reservoir projects; agreements for payment of cost of construction or modification of projects

(b) In carrying out the policy set forth in this section, it is provided that storage may be included in any reservoir project surveyed, planned, constructed or to be planned, surveyed and/or constructed by the Corps of Engineers or the Bureau of Reclamation to impound water for present or anticipated future demand or need for municipal or industrial water, and the reasonable value thereof may be taken into account in estimating the economic value of the entire project: *Provided*, That the cost of any construction or modification authorized under the provisions of this section shall be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction, as determined by the Secretary of the Army or the Secretary of the Interior, as the case may be: *Provided further*, That before construction or modification of any project including water supply provisions for present demand is initiated, State or local interests shall agree to pay for the cost of such provisions in accordance with the provisions of this section: *And provided further*, That not to exceed 30 per centum of the total estimated cost of any project may be allocated to anticipated future demands where State or local interests give reasonable assurances, and there is reasonable evidence, that such demands for the use of such storage will be made within a period of time which will permit paying out the costs allocated to water supply within the life of the project: *And provided further*, That the entire amount of the construction costs, including interest during construction, allocated to water supply shall be repaid within the life of the project but in no event to exceed fifty years after the project is first used for the storage of water for water supply purposes, except that (1) no payment need be made with respect to storage for future water supply

until such supply is first used, and (2) no interest shall be charged on such cost until such supply is first used, but in no case shall the interest-free period exceed ten years. The interest rate used for purposes of computing interest during construction and interest on the unpaid balance shall be determined by the Secretary of the Treasury, as of the beginning of the fiscal year in which construction is initiated, on the basis of the computed average interest rate payable by the Treasury upon its outstanding marketable public obligations, which are neither due nor callable for redemption for fifteen years from date of issue. The provisions of this subsection insofar as they relate to the Bureau of Reclamation and the Secretary of the Interior shall be alternative to and not a substitute for the provisions of the Reclamation Projects Act of 1939 relating to the same subject.

Application to other laws

(c) The provisions of this section shall not be construed to modify the provisions of section 701-1 of Title 33 and section 390 of this title, as amended and extended, or the provisions of sections 372 and 383 of this title.

Approval of Congress of modifications of reservoir projects

(d) Modifications of a reservoir project heretofore authorized, surveyed, planned, or constructed to include storage as provided in subsection (b) of this section which would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or which would involve major structural or operational changes shall be made only upon the approval of Congress as now provided by law. Pub.L. 85-500, Title III, § 301, July 3, 1958, 72 Stat. 319; Pub.L. 87-88, § 10, July 20, 1961, 75 Stat. 210.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-924

SAVE OUR INVALUABLE LAND (SOIL), INC., et al.,
Petitioners,

vs.

COLONEL WILLIAM R. NEEDHAM, et al.,
Respondents,

and

CITY OF OLATHE, KANSAS, et al.,
Intervenor-Respondents.

BRIEF OF CITY OF OLATHE, KANSAS, ET AL., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF CITY OF OLATHE, KANSAS, ET AL., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The only ground invoked for issuance of a writ of certiorari is an asserted conflict of the opinion of the Court of Appeals for the Tenth Circuit in the instant case with the decisions of other courts of appeal, on the scope of judicial review of an Environmental Impact Statement under the National Environmental Policy Act.

The other "Questions Presented" simply challenge the correctness of the judgment of the court below. They will not be further noticed here, other than to observe that they are questions which were completely tried and decided in the trial court, with that judgment affirmed, after having been fully briefed and argued in the Court of Appeals.

The asserted conflict between the courts of appeal is more fancied than real. To illustrate that, pertinent language from the opinion of the Court in the instant case and the cases which it follows will be set out verbatim, followed by similar extracts from the opinions of the courts which allegedly follow a different rule.

The opinion of the Court of Appeals for the Tenth Circuit in the instant case is now reported in the advance sheets, 542 F.2d 539. The pronouncement on the scope of review of the Environmental Impact Statement is succinct, at l.c. 542-3:

> "Judicial review of an EIS is limited to a consideration of the following: (1) does the EIS discuss all of the five procedural requirements listed in 42 U.S.C. § 4332(C); (2) does the EIS constitute a good faith compliance with the demands of NEPA; and (3) does the statement contain a reasonable discussion of the subject matter involved in the five respective areas? *Sierra Club* v. *Stamm*, 507 F.2d 788 (10th Cir. 1974) and *National Helium Corporation* v. *Morton*, 486 F.2d 995 (10th Cir. 1973), cert. denied, 416 U.S. 993, 94 S.Ct. 2405, 40 L.Ed.2d 772 (1973). Thus, in a real sense, an EIS is to be tested by the concepts of 'good faith' and a 'reasonable' discussion of the five mandated areas of subject matter. Perfection is not the test. *Environmental Defense Fund* v. *Corps of Engineers of the United States Army*, 470 F.2d 289 (8th Cir. 1972), cert. denied, 412 U.S. 931, 93 S.Ct. 2749, 37 L.Ed.2d 160 (1972). Nor should the courts in evaluating an EIS engage in hindsight judgment by way of second guessing."

The Court of Appeals for the Tenth Circuit first cites two of its own earlier decided cases, one of which had been denied certiorari by this court.

In the earlier of the two cases, *National Helium Corp.* v. *Morton*, 486 F.2d 995 (C.A.-10, 1973), cert. den. 416 U.S. 993 (1973), the court, Doyle, Circuit Judge, writing, first distinguished *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), on the ground that it involved a review of agency action, i.e. the decision of the Secretary of Transportation in respect to the building of a highway through a park, and not the review of environmental impact statement at all. The court then laid down the rule it distilled from what it deemed to be the better reasoned decisions. Because what the court said there lays out so well the scope of review in the Court of Appeals for the Tenth Circuit, as well as the reasoning which underlies it, the words of the Court are quoted fully. At 1001-2:

> "The better reasoned decisions have required an objective good faith effort to comply with the statutory procedural requirements. Other than that, the courts have demanded that the agency do more than mechanically pursue the procedural standards. Thus, in *Calvert Cliffs' Coord. Com.* v. *United States A. E. Com'n*, 146 U.S.App.D.C. 33, 449 F.2d 1109 (1971), the court added to the good faith standard by saying that the agency must comply with the procedural requirements to the fullest extent possible. The same Circuit in *Natural Resources Defense Council, Inc.* v. *Morton*, 148 U.S.App.D.C. 5, 458 F.2d 827 (1972), has said that the procedural requirements are not intended to be a straitjacket or to demand what is, fairly speaking, not meaningfully possible.
>
> "Finally, the most recent decision of the D. C. Circuit, *Scientists' Institute for Public Information, Inc.* v. *Atomic Energy Commission*, D.C.Cir., 481 F.2d 1079, 1973 (sic), expounds the standards more clearly than earlier decisions:

It is apparent, however, that the Commission seeks to avoid issuing its forthcoming 'environmental survey' as an impact statement under Section 102, not out of any desire to circumvent NEPA's procedural requirements, but rather because of a fear that Section 102's requirements as to the contents of an impact statement are so strict, particularly as to the need for 'detail' in the statement, that any Commission attempt to issue its environmental survey as a NEPA statement would be doomed to failure. While we do not altogether understand the Commission's fears, we feel they are based on certain misapprehensions as to what NEPA requires.

* * *

Accordingly, if the Commission's environmental survey is prepared and issued in accordance with NEPA procedures, and if the Commission makes a good faith effort in the survey to describe the reasonably foreseeable environmental impact of the program, alternatives to the program and their reasonably foreseeable environmental impact, and the irreversible and irretrievable commitment of resources the program involves, we see no reason why the survey will not fully satisfy the requirements of Section 102(C).

"The environmental impact statement should be placed in perspective. The relevant provisions bring environmental factors into the agency decision-making placing them on an equal footing with economic, technical and other considerations. Also, this environmental impact statement serves as source material for the head of the agency, the Congress, the President and the public. See *Calvert Cliffs'*, supra. If the

agency had failed altogether to follow out the procedure required by NEPA, the arbitary and capricious standard might well apply. That is not our present problem. The rule of reason is a more appropriate standard where the sufficiency of the statement is being tested."

The later of the two cases followed, *Sierra Club* v. *Stamm*, 507 F.2d 788 (1974) follows *National Helium Corp.*, supra, so that the instant case is the second case which followed *National Helium Corp.* after this court had denied certiorari.

Petitioners say that *Jicarilla Apache Tribe of Indians* v. *Morton*, 471 F.2d 1275 (C.A.-9, 1973) is, with the Tenth Circuit, in conflict with the other Circuits. However, like *Citizens to Preserve Overton Park* v. *Volpe*, supra, it involved review of agency action and whether necessary procedural requirements had been met. The sufficiency of the environmental impact statements was not even in issue. Refer to 471 F.2d 1275 at l.c. 1281, where the court said:

"Appellants do not challenge the sufficiency of the (environmental impact) statements nor the substantive decisions reached by the Secretary in regard to the projects."

The cases cited by Petitioners in support of the asserted conflict of the rule on the scope of review of an Environmental Impact Statement in the Tenth Circuit, with the rule followed in other circuits, are:

Silva v. *Lynn*, 482 F.2d 1282 (C.A.-1, 1973);

Conservation Council v. *Froehlke*, 473 F.2d 664 (C.A.-4, 1973);

Environmental Defense Fund, Inc. v. *Corps of Engineers*, 492 F.2d 1123 (C.A.-5, 1974);

Environmental Defense Fund, Inc. v. *Tennessee Valley Authority*, 371 F.S. 1004, aff'd 492 F.2d 497 (C.A.-6, 1974);

Sierra Club v. *Froehlke*, 486 F.2d 946 (C.A.-7, 1973);

Environmental Defense Fund, Inc. v. *Froehlke*, 473 F.2d 346 (C.A.-8, 1972);

Calvert Cliffs' Coordinating Committee v. *Atomic Energy Comm.*, 449 F.2d 1109 (D.C.Cir. 1971), cert. den. 404 U.S. 942 (1972).

To facilitate and ease resolution of the issue presented by the petition, the words of the opinions will be set out rather than broad, general and conclusory statements about the rulings of the courts. This should enable ready comparison with the ruling of the Tenth Circuit Court of Appeals, which Petitioners assert "rejects the great weight of authority." (Brief, p. 10).

The Court of Appeals for the First Circuit, in *Silva* v. *Lynn*, supra, said, l.c. 1283:

> "In any event, the judicial inquiries are whether the agency's findings and conclusions in the EIS are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and whether the agency followed the procedures required by law."

The Court of Appeals for the Fourth Circuit, in *Conservation Council* v. *Froehlke*, supra, had before it the question of the obligation to review the merits of a substantive agency decision to determine if it was in accord with the National Environmental Policy Act, rather than the question of the adequacy of an Environmental Impact Statement. The court said, l.c. 1283:

> "We agree with the Eighth Circuit that:
>
> '. . . . District Courts have an obligation to *review substantive agency decisions* on the merits to determine if they are in accord with NEPA.
>
> 'The review is a limited one for the purpose of determining whether the agency reached its *decision* after a full, good faith consideration of environmental factors made under the standards set forth in §§ 101 and 102 of NEPA; and whether the actual balance of costs and benefits struck by the agency according to these standards was arbitrary or clearly gave insufficient weight to environmental factors.'
>
> Environmental Defense Fund v. Froehlke, 473 F.2d 346 (No. 72-1427, 8th Cir., Dec. 14, 1972).
>
> "We think the District Court must engage in a 'substantial inquiry' to determine 'whether there has been a clear error of judgment.' Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1971)."

The Fifth Circuit, in *Environmental Defense Fund, Inc.* v. *Corps of Engineers*, supra, had before it the question of whether the United States Army Corps of Engineers had complied with the duties imposed upon it by the National Environmental Policy Act, including the adequacy of the Environmental Impact Statement. The court held that the refusal of the District Court to review the merits of the Corps' determination to proceed with the project was not reversible error since that decision had been superseded, as in the instant case, by a Congressional decision that the project should go forward, which was made after a legally sufficient environmental impact study

had been filed and debated. The court, however, did say, l.c. 1139-40:

> "We therefore hold that the broad and general provisions of Section 101 do delineate sufficiently definite standards to permit a meaningful, albeit limited, review; and that an agency's ecological decisions under NEPA are not beyond APA scrutiny."

The Sixth Circuit, in *Environmental Defense Fund, Inc.* v. *Tennessee Valley Authority*, 492 F.2d 497 (C.A.-6, 1974), does not deal with the scope of review. However, it affirms the judgment of the District Court, whose opinion contains the quotation from the opinion of the Court of Appeals for the Eighth Circuit, which is quoted above in the extract from the Fourth Circuit's opinion in *Conservation Council* v. *Froehlke*, supra.

The Seventh Circuit, in *Sierra Club* v. *Froehlke*, supra, had the "scope of review" question before it for the first time. After reviewing the authorities, it said, l.c. 953:

> "In light of these statements, we feel compelled to hold that an agency's decision should be subjected to a review on the merits to determine if it is in accord with the substantive requirements of NEPA. The review should be limited to determining whether the agency's decision is arbitrary or capricious. 'The court is not empowered to substitute its judgment for that of the agency.' Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 77 (1971)."

Petitioners cite two cases decided by the Eighth Circuit Court of Appeals and quote from the opinion in one. As Petitioners in their Brief, pp. 10-11, quote from the opinion of the Court in the earlier of the two cases, a pertinent

extract from the opinion in the later case, *Environmental Defense Fund, Inc.* v. *Froehlke*, 473 F.2d 346 (C.A.-8, 1972), here follows for convenience of consideration. At l.c. 353, the court said:

> "The review is a limited one for the purpose of determining whether the agency reached its decision after a full, good faith consideration of environmental factors made under the standards set forth in §§ 101 and 102 of NEPA; and whether the actual balance of costs and benefits struck by the agency according to these standards was arbitrary or clearly gave insufficient weight to environmental factors. Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army, supra.
>
> "We caution, as we did in Environmental Defense Fund, Inc. v. Crops of Engineers of the United States Army, supra, at 300, that:
>
> > '* * * Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.'
>
> "Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 48 L.Ed. 2d 136 (1971)."

The final case cited by petitioners is *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Commission*, supra, which was decided by the Court of Appeals for the District of Columbia. The court in that case had before it, not a particular decision of the agency, but rather a review of the rules promulgated by the Commission governing consideration of environmental values in

individual decisions. On the particular point under consideration the court said, l.c. 1115:

> "The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values. But if the decision was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse."

As is to be expected the rulings of the courts of appeal pertain to the issues brought before them for review. Since those issues were not framed identically in all of the cases cited, it is not surprising that the language employed to define the scope of review may have differed somewhat. Aside from that, however, it would be too much to expect that all of the jurists writing opinions would use the same choice of words to express themselves.

Finally, it is obvious that the Court of Appeals for the Tenth Circuit does not consider itself as being out of harmony with the other circuit courts of appeal, as one of the cases cited in the instant opinion is *National Helium Corporation* v. *Morton,* supra, which relies on *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Commission,* supra, for authority, and *Calvert Cliffs'* is one of the progenitors of other cases allegedly in conflict.

In short, it appears that there is but little difference in the scope of review in the several courts of appeal, and the slight differences in the wording of the rule are simply a matter of semantics.

Accordingly, Intervenor-Respondents ask the Court to refuse to grant a writ of certiorari.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1976

SAVE OUR INVALUABLE LAND (SOIL), INC., ET AL., PETITIONERS

v.

COLONEL WILLIAM R. NEEDHAM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A48-A58) is reported at 542 F. 2d 539. The unreported decision of the district court is set forth at Pet. App. A1-A46.

JURISDICTION

The judgment of the court of appeals was entered September 29, 1976. By order of January 4, 1977, Mr. Justice White extended the time within which to file a petition for a writ of certiorari to and including January 3, 1977. The petition was filed on December 29, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the courts below correctly determined that the environmental impact statement in this case was adequate.

2. Whether the courts correctly held that the 1972 Amendments to the Federal Water Pollution Control Act, which became effective on October 18, 1972, did not apply to Hillsdale Dam for which Congress on August 25, 1972 had appropriated construction funds.

3. Whether the courts correctly found that assurances by state and local interests had satisfied the Water Supply Act of 1958.

STATEMENT

This is an action by certain area landowners and a conservation organization against officials of the Corps of Engineers and the Environmental Protection Agency seeking to stop construction of the Hillsdale Dam on Big Bull Creek, a tributary of the Marais des Cygnes River in Kansas. Big Bull Creek is a slow-moving creek with few riffles and long pools. The creek supports a medium quality fishery including channel catfish, flathead catfish and sunfish. Local wildlife is characterized by species of fairly widespread occurrence (Pet. App. A37-A38).

After construction, the conservation pool above the dam will be a lake having a surface area of 4,580 acres with 51 miles of shoreline. Among the project purposes are water quality, flood control, and water supply.

Petitioners alleged violations of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. 4321 *et seq.*; the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 817, 33 U.S.C. (Supp. V) 1252(b)(3); the Fish and Wildlife Coordination Act of 1958, 72 Stat. 564, 566, as amended, 16 U.S.C. 662 and 663; and the Water Supply Act of 1958, 72 Stat. 319, as amended, 43 U.S.C. 390b(b).

Both the district court, which issued 43 pages of findings of fact and conclusions of law, and the court of appeals rejected petitioners' arguments. First, the courts held that Section 102(b)(3) of the 1972 Amendments to the Federal Water Pollution Control Act, 33 U.S. (Supp. V) 1252(b)(3), did not apply to the Hillsdale Dam, because on August 25, 1972, Congress had appropriated funds to initiate construction of the dam, while the 1972 Amendments did not become effective until October 18, 1972; second, that the Corps' environmental impact statement complied with the requirements of NEPA; third, that there had been "reasonable assurances" by state and local interests that the water to be stored for future demand would be needed and its allocated cost paid within the life of the project (Pet. App. A50-A55).

ARGUMENT

1. The standard of review utilized by the courts below was proper. The district court conducted four days of full evidentiary hearings on the alleged deficiencies of the impact statement, and then determined that the statement was adequate. The court of appeals stated that it had carefully examined the record and agreed with the district court (Pet. App. A54).

Contrary to petitioners' contention (Pet. 10), no conflict among the circuits exists as to the applicable standards for review of the contents of an environmental impact statement. As the court of appeals held, "an EIS is to be tested by the concepts of 'good faith' and a 'reasonable' discussion of the five mandated areas of subject matter" (Pet. App. A54). See *Calvert Cliffs' Coordinating Committee, Inc.* v. *United States Atomic Energy Commission*, 449 F. 2d 1109, 1115 (C.A. D.C.); *National Helium Corp.* v. *Morton*, 486 F. 2d 995, 1001-1003 (C.A. 10), certiorari denied, 416 U.S. 993; *Environmental Defense Fund* v. *Corps of Engineers*, 470 F.

2d 289, 296 (C.A. 8), certiorari denied, 412 U.S. 931; *Lathan* v. *Brinegar*, 506 F. 2d 677, 693 (C.A. 9) (*en banc*). The determination by the court of appeals that the impact statement fully complied with the provisions of NEPA, based upon its careful review of the substantial record made in the district court proceedings, is essentially a factual matter which does not warrant further review by this Court.

2. The requirements of the Water Supply Act of 1958 were met. As regards future water supply the Act provides (43 U.S.C. 390b(b)):

> * * * That not to exceed 30 per centum of the total estimated cost of any project may be allocated to anticipated future demands where the State or local interests give reasonable assurances, and there is reasonable evidence, that such demands for the use of such storage will be made within a period of time which will permit paying out the costs allocated to water supply within the life of the project.

The court of appeals (Pet. App. A55-A56) agreed with the district court that the record establishes that the Corps was given "reasonable assurances" by state and local interests "that there will be a future demand for water which will permit paying out the allocated costs within the life of the project, and that there was 'reasonable evidence' to indicate that there would be such demand." Since two courts have resolved this factual question against petitioners, petitioners' attack on the sufficiency of the evidence (Pet. 21-22) does not justify further review by this Court.

3. The Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. (Supp. V) 1252, did not nullify Congress' prior approval of the construction plans for the project. With respect to Corps projects with storage for water quality control, the amendments require the

Administrator of the Environmental Protection Agency (EPA) to evaluate the need for, the value of, and the impact of the storage for the water quality control aspect of the project. Such evaluation is required to be included in all reports "to Congress *proposing authorization or construction* of any reservoir including such storage" (emphasis added).

The Hillsdale Reservoir was under study for many years. Congress authorized construction and appropriated construction funds on August 25, 1972 (Pet. App. A 3, A26, A29). The FWPCA Amendments became effective on October 18, 1972 (Pet. App. A27). EPA had interpreted the FWPCA as not requiring an evaluation by the Administrator for projects as to which construction has been authorized and construction funds appropriated prior to October 18, 1972 (Pet. App. A29, A34). Congress has been advised of EPA's interpretation and has acquiesced therein by continuing to appropriate funds for the project (Pet. App. A34-A35).

The decision of the court of appeals declining to give the FWPCA retroactive effect is thus correct. *Cape Henry Bird Club* v. *Laird*, 484 F. 2d 453 (C.A. 4), affirming 359 F. Supp. 404 (W.D. Va.).

4. There has been full compliance with the requirements of the Fish and Wildlife Coordination Act of 1958. The Fish and Wildlife Coordination Act, 16 U.S.C. 663(a), requires that "adequate provision consistent with the primary purposes" of the project "shall be made for the use thereof, together with any areas of land, water or interests therein, acquired or administered by a Federal agency in connection therewith, for the conservation, maintenance and management of wildlife resources thereof, and its habitat thereon * * *." Under Section 663(c) additional land *may*

be acquired for wildlife conservation purposes, if authorized by Congress either before *or after* the project itself is authorized. Thus, not only is acquisition of additional lands not mandatory, such acquisition depends on specific congressional authorization. 16 U.S.C. 663(c).

Petitioners' contention that the Corps of Engineers did not adequately consult with other agencies is refuted by the district court's finding that the Corps consulted "extensively" with such agencies (Pet. App. A38, A39).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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